83-161

Office - Supreme Court, U.S.
FILED
MAR 29 1984
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

PETER WALTON

Appellant

v.

ALASKA BAR ASSOCIATION

Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

JURISDICTIONAL STATEMENT

ROBERT H. WAGSTAFF
912 West Sixth Avenue
Anchorage, Alaska 99501
(907) 277-8611
Counsel for Appellant

QUESTIONS PRESENTED

1. Does the due process clause of the Fourteenth Amendment to the Constitution of the United States require that when fraud is alleged in attorney discipline proceedings proof must be by clear and convincing evidence?

2. Does the equal protection clause of the Fourteenth Amendment to the Constitution of the United States require that proof be by clear and convincing evidence in attorney discipline proceedings when the standard of proof in judicial disciplinary proceedings is by clear and convincing evidence?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
TABLE OF CASES AND AUTHORITIES iii
INTRODUCTION 2
OPINION BELOW 4
JURISDICTION 4
REGULATORY AND CONSTITUTIONAL PROVISIONS INVOLVED 5
STATEMENT OF THE CASE 7
THE QUESTION PRESENTED IS SUBSTANTIAL 13
CONCLUSION 19
APPENDICES:
I. OPINION OF THE SUPREME COURT OF ALASKA
II. OPINION OF THE SUPREME COURT OF ALASKA ON REHEARING
III. NOTICE OF APPEAL AND CERTIFICATE

TABLE OF AUTHORITIES

CASES: *Page*

ADDINGTON v. TEXAS, 441 U.S. 418 (1979) 14, 19
BANK OF POCAHONTAS v. FERIMER, 170 S.E. 591, (Va. 1933) 16
BOWE v. GAUGE, 106 N.W. 1074, (Wisc. 1906) 16
FLORIDA BAR v. QUICK, 279 So.2d 4 (Fla. 1973) 17
IN RE GAULT, 387 U.S. 1 (1967) 14
IN RE HANSON, 532 P.2d 303 (Alaska 1975) 2, 17
IN RE RUFFALO, 390 U.S. 544 (1968) 13, 16
IN THE MATTER OF J. MAY, 538 P.2d 787 (Idaho 1975) 18
SANTOSKY v. KRAMER, 455 U.S. 745 (1982) 18
WEININGER v. METROPOLITAN FIRE INSURANCE CO., 195 N.E. 420 (Ill. 1935) 16
WOODBY v. INS, 385 U.S. 276 (1966) 16

UNITED STATES CONSTITUTIONAL PROVISIONS:

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 6

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

PETER WALTON

Appellant

v.

ALASKA BAR ASSOCIATION

Appellee

JURISDICTIONAL STATEMENT

INTRODUCTION

This is an appeal from the opinion of the Supreme Court of the State of Alaska announced on October 10, 1983 and in which re-hearing was granted in part on January 3, 1984. In a three justice *Per Curiam* decision with two dissenters, the Alaska Supreme Court decided, *inter alia,* that a preponderance of the evidence showed that Appellant Peter Walton had fabricated false evidence in violation of DR1-102 and DR7-102 of the Code of Professional Responsibility. In so doing the majority upheld the preponderance of the evidence standard of Alaska Bar Rule 15(f) notwithstanding that the same Court had previously held that proof by clear and convincing evidence was required in disciplinary proceedings against a judge. *In Re Hanson,* 532 P.2d at 303, 308 (Ak. 1975). Former Chief Justice Rabinowitz, with whom Justice Matthews joined, dissented:

> I dissent from the majority's rejection of Walton's due process claim as it relates to the applicable burden of proof in bar disciplinary matters. I further dissent from the majority's affirmance of the Disciplinary Board's findings of fact regarding Walton's alleged violation of the various Disiplinary Rules involved in this proceeding. Employing a clear and convincing burden of proof, my review of the record persuades me that the bar has only demonstrated that Walton's conduct was both negligent and grossly negligent, thus violative of DR 1-102(A)(5) and (6). I would therefore impose the sanction of a public censure.
>
> * * *
>
> In my view, the United States Supreme Court's decision in *Santosky v. Kramer,* 455 U.S. 745, 71 L.Ed.2d 599 (1982) furnishes persuasive support for Walton's position. In Santosky, the court was called upon to determine whether the "preponderance of the evidence" or "clear and convincing" standard should be applied in parental rights termination proceedings. Applying the three factors enunciated in Mathews v. Eldridge, 424 U.S. 319, 335, 47 L.Ed.2d 18, 33 (1976), which governs a determination

of what process is due under the Fourteenth Amendment in any given fact situation, [footnote omitted] the Santosky court concluded that the first factor, the importance of the individual interests at stake, dictated that a clear and convincing standard be applied:

> This Court has mandated an intermediate standard of proof — "clear and convincing evidence" — when the individual interests at take in a state proceeding are both "particularly important" and "more substantial than mere loss of money." *Addington v. Texas,* 441 U.S. at 424, 60 L.Ed.2d 323, 99 S.Ct. 1804. Notwithstanding "the state's 'civil labels and good intentions,'" id., at 427, 60 L.Ed.2d 323, 99 S.Ct. 1804, quoting *In Re Winship,* 397 U.S. at 365-366, 25 L.Ed.2d 368, 90 S.Ct. 1068, 51 Ohio Ops. 2d 323, the Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with a "a significant deprivation of liberty" or "stigma". 441 U.S. at 425, 426, 60 L.Ed.2d 323, 99 S.Ct. 1804. See, e.g., *Addington v. Texas,* supra, (civil commitment); *Woodby vs. INS,* 385 U.S. at 285, 17 L.Ed.2d 362, 87 S.Ct. 483 (deportation); *Chaunt v. U.S.,* 364 U.S. 350, 353, L.Ed.2d 120, 81 S.Ct. 147 (1960) (denaturalization); *Schneiderman v. U.S.,* 320 U.S. 118, 125, 159, 87 L.Ed. 1796, 63 S.Ct. 1333 (1943) (denaturalization).

455 U.S. 745, 71 L.Ed.2d 599 at 608-09. I think it apparant that the individual interests at stake in a bar disciplinary proceeding are "particularly important and more substantial than the mere loss of money" to the attorney involved. The proceedings stigmatize the attorney and threaten him with a significant deprivation of liberty.

The second *Eldridge* factor, whether the Bar Rule's chosen standard creates a risk of error, again weighs in favor of adopting the clear and convincing evidence stan-

dard. This is evidenced by the facts of the instant case. If Walton is indeed innocent of the allegations made against him, the risk of wrongful discipline would be significantly reduced by using the clear and convincing evidence standard.

Concerning the third *Eldridge* factor, it is clear that the state has an interest in protecting society from attorneys who have violated bar disciplinary rules. [Footnotes omitted] The Supreme Court has characterized the preponderance of the evidence standard as placing the risk of error equally upon the parties. When adopting the clear and convincing evidence standard in *Addington v. Texas*, 441 U.S. 418, 427, 60 L.Ed.2d 323 (1978), the Supreme Court stated "[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." The dispositive inquiry thus becomes whether the potential injury to the attorney from an incorrect determination of a violation of the disciplinary rules is "significantly greater" than the possible harm to the state caused by: (1) an incorrect determination that an attorney has not violated the rules, and (2) the increased burden on the state of meeting the higher standard of proof....

App. I, pp. 20-23.

This Jurisdictional Statement is submitted to show that the United States Supreme Court has jurisdiction of this appeal and a substantial question concerning the denial of the due process and equal protection of law is presented meriting plenary consideration.

OPINION BELOW

The Opinion of the Supreme Court of the State of Alaska, not yet reported, appears in Appendix I.

JURISDICTION

Notice of Appeal and this Jurisdictional Statement were filed within ninety days of the Opinion on Rehearing date, Appendices II, III. This Court's jurisdiction is invoked under

28 USC 1257(2). The Supreme Court of Alaska specifically ruled that Alaska Bar Rule 15 which provides in pertinent part that it need be demonstrated only by "the preponderance of the evidence that the respondent has, by act or omission, committed an offense as provided in Rule 11" does not violate the Fourteenth Amendment to the Constitution of the United States: "Thus, we reject Walton's position that proof by clear and convincing evidence is required as a matter of Federal due process." *Id.* at App. II, p. 3. The Alaska majority acknowledged in footnote 8 of its Opinion that nonetheless the clear and convincing standard was appropriate to judicial disciplinary proceedings, noting only that this standard may have to be re-evaluated in an unspecified future case.

REGULATORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Alaska Bar Rule 15, having the force of law, provides in pertinent part as follows:

> (f) Following the service of the answer or the expiration of the time for service of an answer, if there are any issues of fact raised by the pleadings or if the Respondent requests, within the time allowed to answer, the opportunity to be heard in mitigation, the matter shall be assigned to a Hearing Committee. After said assignment the Administrator shall serve a notice of hearing upon the Respondent, or his counsel, indicating the date and place of the hearing, and the names and addresses of the members of the Hearing Committee before whom the matter will be heard. The notice of hearing shall be advise the Respondent that he is entitled to be represented by counsel, to examine and cross-examine witnesses, to present evidence in his own behalf, to have subpoenas issued in his behalf, to challenge peremptorily and for cause members of the Hearing Committee as provided in subparagraphs (c) and (d) above, and to have an attorney appointed to represent him as provided in Rule 22 below. *The Administrator shall have the burden at such hearings of demonstrating by the preponderance of*

the evidence that the Respondent has, by act, or omission, committed an offense as provided in Rule 11. The rules of evidence applicable in administrative hearings shall apply in all hearings before hearing Committees. (Emphasis supplied.)

The Fourteenth Amendment to the Constitution of the United States provides:

Sec. 1. Citizenship rights are not to be abridged by states. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

DR 1-102 provides:

Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

* * *

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentations.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 7-102 provides:

Representing a Client Within the Bounds of the Law.

(A) A lawyer shall not:

(3) Conceal or knowingly fail to disclose that which

he is required by law to reveal.

* * *

(6) Participate in the creation of preservation of evidence when he knows or it is obvious that the evidence is false.

STATEMENT OF THE CASE

Anchorage attorney Peter Walton has been erroneously found guilty of fabricating an exhibit and attaching it to an amended complaint with the specific intent to mislead. Peter Walton is innocent of any intentional wrongdoing. The exhibit was intended to be used and was in fact used only as an illustration of his client's theory of the case as alleged in the amended complaint. When a question as to the exhibit's authenticity first arose, Walton fully explained the exhibit's origins and purpose. Indeed, two members of the Supreme Court of the State of Alaska are convinced that Walton did not intend to deceive anyone.

Speaking for himself and Justice Matthews, Justice Rabinowitz stated that the reason that he was "convinced [that] Walton did not intend to deceive" (*ibid.* p. 26), was based upon his study of the record. He set forth eight factors arguing for innocence:

1. Walton did not use the fabricated document in the deposition of Childs even though it was in existence at that time. If he had had any intent of using the document as evidence it would seem that he would have confronted Childs with it.

2. It is difficult to understand what Walton had to gain by foisting the fabricated copy off as an actual photocopy. It is undisputed that the document Childs recorded was materially different than the document Childs signed. That is all that the fabricated document, if it were taken to be real, would demonstrate.

3. There was little chance of any deception succeeding. Walton did not surreptitiously fabricate the document but did so in the presence of Cowden and of Lee Holen,

a contract law clerk. The record is not clear on whether other people were present, but is clear that opposing counsel, Wade, had heard that Walton had been using some white-out and a xerox machine in connection with the case, before Wade even received the fabricated document.

4. When ambiguous responses were given by Cowden at his desposition (which was taken only one day after the fabricated document had been filed with the court) Walton promptly elicited the truth of the matter on cross examination.

5. The care exercised by Walton in preparing the exhibit says as much about Walton's compulsive nature as about any intent to deceive.

6. Walton's "decision to ignore the warnings of a colleague regarding the possible misinterpretation of the reference to the document" is again equally consistent with innocent as with guilt.

7. The "smoking gun" memorandum was a memo from Walton to Cowden to which the exhibit was attached. It stated, "Dear Frank: Guess what? Here's the smoking gun. Either Childs falsely testified when he said he gave Lily a copy of his deed of trust on March 2nd, or he falsely testified when he said it hadn't been altered after [executing] it. But in that case he will have difficulty explaining why he concealed the fact of its alteration. Cheers, Pete Walton." The memo was not a communication to the court or opposing counsel. It was a communication to a client that could be clarified subsequently. It does not constitute evidence of any intent to mislead the court or opposing counsel.

8. The fabricated document was attached to the complaint and to a memorandum in opposition to a motion to dismiss which was filed on the same day as the complaint. It appears that the motion to dismiss was of no particular consequence and that Walton was told by Wade before the opposition was filed that Wade was going to withdraw the motion to dismiss.

Dissenting Opinion pp. 27-30.

The prosecuting attorney for the Alaska Bar Association conceded in his closing argument before the Disciplinary Hearing Committee that:

> The evidence is not here clear that there is an intentional deception on the part of Mr. Walton, except that he intentionally included this document in his pleadings and intentionally used the language that he did. As to whether he intended to deceive the court there is very little evidence of that except that again he intentionally included it in the pleadings which were filed with the court. Obviously when faced with it or when the question about these documents became apparent, he took steps to clear up the matter, and whatever you believe about his other actions this certainly should be considered in his behalf.

Tr. 223.

On May 11, 1978 the case at bar was percipitated when defense counsel Wade filed a motion for sanctions against Walton and his client in the case of *The Aleut Corporation v. L. William Childs*, filed weeks earlier in Anchorage Superior Court. Childs was the former business manager of the Aleut Corporation and was also being sued by the Aleut Corporation for multiple breaches of his employment contract in an earlier 1975 case which had come to trial on March 1, 1978.

During this trial, an issue arose concerning corporate loans to relatives, officers and directors. This prompted the Corporation's vice-president, Cowden, to review all of the Corporation's outstanding loans. He discovered that a loan for $13,000 had been made to Childs by the Corporation in March, 1973 which he believed to be illegal because it was in violation of the Alaska Native Claims Settlement Act and the Corporation's Articles of Incorporation.

---

[1] The Aleut Corporation is a Regional Corporation formed pursuant to the Alaska Native Claims Settlement Act. PL 92-203.

Cowden was troubled by something else about the loan paperwork. The $13,000 note recited on its face that it was "secured by a deed of trust," yet no deed of trust could be found among the Corporation's records and none of the officers or board members knew of any such instrument. A recorded deed of trust from Childs to the Corporation was located at the District Recorder's Office and brought to Walton's attention around March 10, 1978. (Tr. 122, 156, 172-173).

The recorded deed of trust was suspicious in a number of respects. Although the promissory note referred to a "deed of trust" by which it was secured, the deed of trust which Childs had actually recorded was specifically denominated as a "Second Deed of Trust." Furthermore, it contained a subordination clause stating that it was subordinated to a $47,000 deed of trust *subsequently* executed to the Alaska Mutual Savings Bank. The subordination clause stated that the Bank's first deed of trust was recorded on March 6, 1973, four days *after* the deed of trust in favor of the Corporation had been executed by Childs before a notary. The original deed of trust had thus been altered after execution by the insertion of the subordination clause. A second law suit was filed against Childs to recover the $13,000.

Concurrently, the trial of the 1975 case was unexpectedly recessed due to the sudden illness and subsequent death of Childs' counsel. (Tr. 173). During this respite Childs' deposition was taken. Childs testified that he signed the promissory note on March 2, 1973, and that he executed the deed of trust and delivered a copy of it to the Corporation on the same date. He further testified that the deed of trust had not been altered after he signed it. (Tr. 180). The deposition was adjourned.

This testimony of Childs appeared false in light of the fact that the subordination clause of the deed of trust referred on its face to another deed of trust to Alaska Mutual Savings Bank which had been executed and recorded four days later. It was apparent that the subordination clause had been inserted in the deed of trust sometime after it was signed on March 2, 1972, but before its recordation on October 6, 1983.

Childs' deposition was resumed on April 21, 1978, and he recanted portions of his prior testimony. He now testified that the original deed of trust was indeed altered after he signed it by adding the subordination clause, but he claimed that the alteration had been previously agreed to by the parties. (Tr. 181). The Aleut Corporation maintained that it had never approved such a transaction.

Based on the deposition testimony of Childs, Walton prepared and filed an Amended Complaint in the new action. Exhibit "C" to the amended Complaint was a copy of the deed of trust as it was altered and later recorded by Childs. Exhibit "B" to the Amended Complaint, the document at issue, was an illustrative depiction of how Walton believed the original deed of trust appeared when signed by Childs and notarized on March 2, 1973 (Tr. 190). This illustrative depiction was based on Childs' deposition testimony.

Walton created illustrative Exhibit "B" by making a Xerox copy of the deed of trust as altered and recorded by Childs. Using this copy, Walton then blanked out what he believed to be the provisions wrongfully added to the instrument after its execution and the markings imprinted by the District Recorder. He thereby created an accurate, representative manifestation of the Corporation's allegations against Childs. Exhibit "B" was appropriately described and identified in paragraph 4 of the Amended Complaint:

> 4. Accordingly, on 2 March 1973, for the purpose of financing a downpayment in connection with defendants obtained funds from the plaintiff totaling $13,000, repayment of which they professed would be made according to the terms of a Promissory Note attached hereto marked Exhibit A. At the same time, defendants executed a Deed of Trust for the benefit of the plaintiff Corporation and delivered a copy thereof to the president and secretary of the plaintiff Corporation. *A copy of that copy is attached hereto marked Exhibit "B".*
>
> 5. The original Deed of Trust was either retained by defendant L. William Childs, or at his direction, was left with a legal secretary named Susan Abbott, then

> employed by attorneys for the plaintiff Corporation. On its face, the original Deed of Trust *(of which a copy is attached marked Exhibit B)* appeared to be a first Deed of Trust, not secondary to any other lien on the subject property.
>
> 6. Either by express representations or by his silence, defendant L. William Childs represented to plaintiff and/or led the plaintiff to reasonably believe that the said Deed of Trust, Exhibit B, was a first Deed of Trust and not subordinate to any other lien on the subject property.... (Emphasis Supplied)

On May 2, 1978, Childs' attorney noticed the deposition of Aleut Vice President Cowden who had been present when Walton prepared one page of the illustration. At no time prior to this deposition did Childs' attorney ever make any inquiry as to the authenticity of Exhibit "B" nor was any such representation made by Walton. At the deposition Walton himself elicited all of the circumstances surrounding his reconstruction of Exhibit "B". Walton himself brought forth that Exhibit "B" was only a graphic depiction and illustration of the Corporation's allegations to show how the original deed of trust had been altered. (Cowden deposition at 26).

A grievance procedure was initiated against Walton by the Alaska Bar Association. At the hearing before the Hearing Committee, Child's attorney conceded that Walton had fully disclosed on his own initiative precisely how Exhibit B to the Amended Complaint was created. Tr. 48-49. Childs' attorney admitted that his Motion for Sanctions was filed only as a "tactical matter" (p. 101), and that prior to the Cowden deposition he had never asked Walton about Exhibit "B". Tr. 106-107.

Walton's attorney law clerk testified about the creation of illustrative Exhibit "B":

> Q. Did Mr. Walton ever say anything to you or in your presence that would have led you to believe that it was his intention to take that created document and offer it

as evidence or as proof or can you tell the court that this was really a document that came from the files of the Aleut Corporation.

A. No, he didn't, it was always referred to as illustrative or as illustrating the theories of the lawsuit.

* * *

Tr. 126.

Aleut Vice President Cowden was also present when Exhibit "B" was prepared. He testified it was for illustrative purposes only and not for deception.

The Board of Governors of the Alaska Bar Association concluded that Exhibit B to the 1978 Amended Complaint was intentionally fraudulent and that he be suspended for a period of 18 months. A one member majority of the Supreme Court of Alaska agreed, finding that only a preponderence of the evidence before the Board of Governors was necessary to show fraud and ordered that Walton be suspended for eighteen months. This appeal has followed.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This Court held in *In Re Ruffalo,* 390 U.S. 544 (1968) that a lawyer charged with misconduct in disbarment proceedings is entitled to due process under the Fourteenth Amendment. The Court stated:

> Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. *Ex parte Garland,* 4 Wall. 333, 380; *Spevack v. Klein,* 385 U.S. 511, 515. He is accordingly entitled to procedural due process, which includes fair notice of the charge. See *In Re Oliver,* 333 U.S. 257, 273.
>
> * * *
>
> *These are adversary proceedings of a quasi-criminal nature.* Cf. *In Re Gault,* 387 U.S. 1, 33.
>
> 390 U.S. 550, 551, (footnote omitted) (emphasis added.)

In holding that attorney disciplinary proceedings are quasi-criminal, this Court cited *In Re Gault*, 387 U.S. 1, 33 (1966). In *Gault* this Court held that the constitutional guarantees of due process apply to proceedings in which juveniles are charged as delinquents, finding those proceedings to be quasi-criminal. Walton here urges that due process requires the use of a clear and convincing standard of evidence in attorney disciplinary proceedings as they are quasi-criminal, particularly when fraud is alleged.

In *Addington v. Texas*, 441 U.S. 418 (1979) this Court adopted the clear and convincing standard of proof as being required by the Fourteenth Amendment in a civil proceeding brought under state law to commit an individual to a state mental hospital:

> The function of a standard of proof, as that concept is embodied in the due Process Clause and in the realm of fact finding, is to "instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In Re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.
>
> Generally speaking, the evolution of this area of the law has produced across a continuum three standards or levels of proof for different types of cases. At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion.
>
> In a criminal case, on the other hand, the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude

as nearly as possible the likelihood of an erroneous judgment. In the administration of criminal justice, our society imposes almost the entire risk of error upon itself. This is accomplished by requiring under the Due Process Clause that the state prove the guilt of an accused beyond a reasonable doubt. *In Re Winship*, supra.

The intermediate standard, which usually employs some combination of the words "clear", "cogent", "unequivocal" and "convincing", is less commonly used, but nonetheless "is no stranger to the civil law." *Woodby v. INS*, 385 U.S. 276, 285 (1966). See also McCormick, Evidence Sec. 320 (1954); 9 J. Wigmore, Evidence Sec. 2498 (3d ed. 1940). *One typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof.* Similarly, this Court has used the "clear, unequivocal and convincing" standard of proof to protect particularly important individual interests in various civil cases. See, e.g., *Woodby v. INS*, supra, at 285 (deporation); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (denaturalization); *Schneiderman v. United States*, 320 U.S. 118, 125, 159 (1943) (denaturalization). (Emphasis supplied).

* * *

In cases involving individual rights, whether criminal or civil, "[t]he standard of proof [at a minimum] reflects the value society places on individual liberty."

Id.441 U.S. 423-425 (footnotes omitted) (emphasis added).

Society should have a high degree of confidence in the correctness of factual conclusions in attorney disciplinary proceedings, particularly where fraud has been alleged. Since society has minimal concern with the outcome of private suits,

plaintiff's ordinary burden of proof is a mere preponderance of the evidence, the litigants thus sharing the risk in a roughly equal fashion. However, where a civil case involves allegations of fraud or some other quasi-criminal wrongdoing the clear and convincing evidence standard is appropriately used. *Ruffalo, supra,* stands for the proposition that attorney disciplinary proceedings are indeed quasi-criminal, which can hardly be doubted considering the penalty imposed upon Peter Walton. In synthesis with *Addington,* due process requires that clear and convincing evidence be the predicate for attorney discipline, particularly where intentional wrongdoing is alleged.

In the case at bar actual fraud is asserted which gives an independent ground for adoption of the clear and convincing evidence standard. At common law and today allegations of fraud have required proof by clear and convincing evidence. *Woodby v. INS,* 385 U.S. 276, 285, n. 18, (1966); *Weininger v. Metropolitan Fire Ins. Co.,* 195 N.E. 420, 426 (Ill. 1935); *Bank of Pocahontas v. Ferimer,* 170 S.E. 591, 592 (Va. 1933); *Bowe v. Gauge,* 106 N.W. 1074, 1076 (Wisc. 1906).

An attorney has a greater interest in these quasi-criminal proceedings than simply that of a potential adverse money judgment. The public has a definite interest in the question of whether an attorney has committed an act of wrongdoing. Most importantly, the function of the procedural process is to minimize the risk of erroneous decisions, a value that society, attorneys, and courts should consider heavily before determining that an attorney has intentionally committed a fraudulent act.

Even looking at the evidence in the light most favorable to the Alaska Bar Association this case is extremely close, indeed as close as a case can be. Peter Walton maintains his innocence of any wrongdoing. The only testimony presented against him was that of Child's attorney as to what was in the amended complaint. When a question was first raised about Exhibit "B"'s genuineness its origin was explained fully by Walton. There was no direct evidence relating to his intent. The only evidence was circumstantial, was introduced by Walton

himself, and was as exculpatory as it was accusatory. The amended complaint and exhibits were prepared with the knowledge of many persons. If there was indeed an attempt to fabricate evidence, maintenance of such an attempt would have required the perjury of at least another attorney and virtually the entire directorate and officers of the Aleut Corporation.

In the case of *In Re Hanson*, 532 P.2d 303, 308 (Alaska 1975) the Supreme Court of Alaska held that the clear and convincing standard should apply in judicial disciplinary proceedings. No less a test should be applied in attorney disciplinary proceedings.

In *Hanson* the Alaska Supreme Court cited the Supreme Court of Texas in the matter of *In Re Laughlin:*

> The serious nature of the proceeding depriving one of a public office...ought at the very least to require proof by clear and convincing evidence.
>
> 265 S.W.2d at 809.

The same argument is appropriate to attorneys. The same quantum of evidence should apply to judges and lawyers because the same basic issues are involved. To do less denies attorneys the equal protection of the law.

The Alaska dissenters noted that thirty-one states and the District of Columbia require the clear and convincing standard. Dissent n. 3. The National Center for Professional Responsibilities, *Professional Discipline for Lawyers and Judges (1979)*, recommends in Sec. 8.40 that "[f]ormal charges should be established by clear and convincing evidence." This is also the position of the American Bar Association.

The Supreme Court of Florida appropriately noted in *Florida Bar v. Quick*, 279 So.2d 4, 8-9 (Fla. 1973):

> It is necessary to bear in mind, however, that disciplinary actions, while not fully criminal in character, are penal proceedings the results of which may permanently cripple an attorney's reputation and standing in the community.

> Thus, we adhere to the view we took in *The Florida Bar v. Rayman*, supra, that the quantum of proof necessary to sustain a referee's finding of guilty is something more than the mere "preponderance of the evidence" sufficient for a civil action. We have defined that quantum as "clear and convincing evidence", not as stringent a standard as that required in criminal cases, but most certainly more than the contradictory and inconclusive testimony adduced in the instant case.

Even if this Court were to find that only a preponderance of the evidence is necessary to find a violation of sections of the Code of Professionl Responsibility relating to conflicts of interest, charging of fees, and the like, it should nonetheless find that, when fraud is alleged, due process requires proof by clear and convincing evidence. That is the same quantum of evidence that would be required in a civil action to return a money judgement in favor of any aggrieved client. A disciplinary action should not require less proof.

Idaho is a state that is listed in the *State Disciplinary Enforcement Systems Structural Survey* as requiring proof only by a preponderance of the evidence. However, in a case where attorney fraud was alleged the Idaho Supreme Court determined that:

> The circumstantial evidence relied upon by the Disciplinary Committee to support its finding of fraudulent and deceitful conduct does not meet the requirement of proof by a "clear and undoubted preponderance of the evidence" in disciplinary proceedings.

In the Matter of J. May, 538 P.2d 787 (Idaho 1975) at 790, 791.

In *Santosky v. Kramer*, 455 U.S. 745, 755 (1982), this Court noted that "the degree of proof required in a particular type of proceeding 'is the kind of question which has been left to the judiciary to resolve'", holding that specified state procedures must meet the requirements of federal due process. Peter Walton asks this Court to resolve the appropriate standard of evidence for attorney discipline proceedings where

fraud is alleged consistent with federal due process. An attorney's interest in the continued practice of law is particularly important to both himself and the public and more substantial than the loss of money. *Addington v. Texas*, 441 U.S. 244, 245.

CONCLUSION

Peter Walton is innocent. He has been wrongly found guilty of intentional malfeasance by the use of a standard of proof constitutionally inappropriate to the circumstances of the charge, the stigma incurred, and the loss sustained. This Court should accordingly note probable jurisdiction.

Dated this thirtieth day of March, 1984, at Anchorage, Alaska.

ROBERT H. WAGSTAFF
Attorney for Peter Walton

Robert H. Wagstaff
912 West Sixth Avenue
Anchorage, Alska 99501
(907) 277-8611

APPENDICES

APPENDIX I

NOTICE: This opinion is subject to formal correction before publication in the *Pacific Reporter*. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

THE SUPREME COURT FOR THE STATE OF ALASKA

In the Disciplinary Matter Involving:	)	
PETER B. WALTON,	)	File No. 6289
Respondent-Attorney	)	OPINION
	)	[No. 2734 — September 30, 1983]

Appeal from the Disciplinary Board of the Alaska Bar Association.

Appearances: Robert H. Wagstaff, Wagstaff, Middleton & Pope, Anchorage, for Respondent. John R. Lohff, Lohff and Van Goor, Anchorage, for Alaska Bar Association.

Before: Burk, Chief Justice, Rabinowitz, Mathews, and Compton, Justices, and Carpeneti,* Superior Court Judge. (Moore, Justice, not participant.)

PER CURIAM

RABINOWITZ, Justice, with whom MATTHEWS, Justice, joins, dissenting.

---

*Carpeneti, Superior Court Judge, sitting by assignment made pursuant to Article IV, Section 16, of the Constitution of Alaska.

This is a disciplinary matter involving attorney Peter B. Walton. Walton allegedly "created" a document, a copy of which he later attached, as an exhibit, to an unverified complaint. This action resulted in the Alaska Bar Association [ABA] initiating disciplinary proceedings against him. The Disciplinary Board[1] of the ABA recommended that Walton be suspended from the practice of law for eighteen months.[2] Walton contends that he has been denied due process of the law and that the evidence does not support a finding of any wrongdoing.

Walton "created" the document while representing the Aleut Corporation in civil litigation against L. William Childs. Childs has been Aleut's chief executive officer from 1972 until mid-1975, when his relationship with the corporation's board of directors and officers deteriorated. When Childs left Aleut, there was disagreement as to Aleut's obligations under its employment contract with Childs. Aleut filed a declaratory judgment action against Childs to resolve the uncertainty.

In early March, 1978, Frank Cowden, Aleut's vice-president and director for litigation, reviewed all of Aleut's outstanding loans. He discovered a March 2, 1973, promissory note, executed by Childs in favor of Aleut for $13,000. The promissory note stated that it was secured by a deed of trust on a specified parcel of real estate. Unable to find a copy of the deed of trust in the corporation's records, Cowden went to the Recorder's Office and obtained a copy of the recorded deed. Although the promissory note referred to a deed of trust, the one found at the Recorder's Office was labelled a *second* deed of trust and contained a subordination clause. The deed of trust was signed by Childs and notarized on March 2, 1973. The subordination clause stated that the deed was subordinate to another deed of trust held by Alaska Mutual Savings Bank, which secured a $47,000 loan to Childs executed on March

---

[1] In disciplinary matters, the Board of Governors of the Alaska Bar Association is referred to as the "Disciplinary Board." Rule II-13(a), Alaska Bar R.

[2] The Board's findings and recommendations are attached hereto as Appendix "A."

5, 1973, and was recorded on March 6, 1973. Thus, on its face, the deed of trust in favor of Aleut appeared to have been altered, by adding the subordination clause after Childs had signed it. In addition, Childs had not recorded the deed until October 6, 1973.

In mid-March 1978, Walton filed a second lawsuit on Aleut's behalf against Childs [Childs II], alleging that the $13,000 loan was illegal. Childs moved to dismiss the complaint. However, so that scheduled depositions could be completed, the parties stipulated that Aleut's opposition to that motion did not have to be filed until April 25, 1978.

Childs' deposition began on April 13, 1978. He testified that the $13,000 loan was made pursuant to an understanding that Aleut would furnish the down payment that Childs needed to purchase a home in Anchorage, in consideration for his moving to Alaska to work for the corporation. He stated that he had signed the promissory note March 2, 1972, and that he had executed and delivered a copy of the deed of trust to Aleut on the same date. He further testified that the deed of trust had not been altered after he signed it. On April 21, 1978, Childs' depostion was resumed. Before any questioning began, Childs stated that he wanted to change his earlier statement that the deed of trust had not been altered. He admitted that it had and that he knew of this prior to having it recorded.

On April 25, 1975, Aleut, through Walton, filed an amended complaint in Childs II alleging that Childs had defrauded the corporation in obtaining the $13,000 loan. Paragraph 4 of the complaint stated:

> 4. Accordingly, on 2 March, 1973, for the purpose of financing a down payment in connection with the purchase of a home in Anchorage, Alaska, defendants obtained funds from the plaintiff totaling $13,000, repayment of which they professed would be made according to the terms of a Promissory Note attached hereto marked Exhibit A. At the same time, defendants executed a Deed of Trust for the benefit of the plaintiff Corporation and delivered a copy thereof to the president and secretary of the plaintiff corporation. *A copy of that copy is attached hereto marked Exhibit B.*

> The original Deed of Trust was either retained by defendant L. William Childs or, at his discretion, was left with a legal secretary named Susan Abbott, then employed by attorneys for the plaintiff Corporation. On its face, the original Deed of Trust *(of which a copy is attached marked Exhibit B)* appeared to be a first Deed of Trust, not secondary to any other lien on the subject property.
>
> Either by express representations or by his silence, defendant L. William Childs represented to plaintiff and/or led the plaintiff to reasonably believe that the said Deed of Trust, *Exhibit B,* was a first Deed of Trust and not subordinate to any other lien on the subject property. In fact, however, defendant did not own the real property in which he purporated to grant plaintiff a security interest in the form of a Deed of Trust. (Emphasis added).

In Paragraph 8, the amended complaint alleged that Childs later materially altered the original deed of trust by adding the word "Second" to the top of the document and by adding the subordination clause. The complaint referred to this allegedly altered deed as Exhibit D.

Although the references to Exhibit B in Paragraph 4 suggested that the original deed of trust is a copy (or a copy of a copy) of an exisiting document signed by Childs,[3] that was not in fact the case. As stated in the opening brief submitted by Walton to this court:

> Walton created illustrative Exhibit "B" by making a xerox copy of the deed of trust as altered and recorded by Childs. Using this copy, Walton then blanked out what he believed to be those provisions that had been wrongfully added to the instrument after its execution.

The blanked out parts consisted of: "(1) recording data; (2) the word '*Second*'; (3) the subordination clause; (4) and the recording information on p. 2 (reverse side) of the Deed of

---

[3] Similar references to Exhibit B are also made in paragraphs 5, 8 and 12 in the amended complaint.

trust..." Walton "created" this document on April 14, 1978, the day after Childs stated in his deposition that the deed had not been altered, but before Childs later corrected his earlier statement.

The amended complaint was served on Childs' attorney, Hugh G. Wade, on April 25, 1978. Although Walton believed that filing the amended complaint rendered the motion to dismiss moot, he filed an opposition to the motion in which the deed of trust he "created" was referred to[4] and attached thereto as Exhibit K.

Wade eventually discovered through depositions that Exhibit B was a reconstruction of the deed of trust, and filed a motion for sanction in the superior court. The superior court dismissed the amended complaint in Childs II without prejudice, and referred the matter to the district attorney for possible criminal prosecution under AS 11.30.300 (Preparing False Evidence)[5] and to the ABA for possible disciplinary action.

On August 5, 1980, the State Bar Disciplinary Administrator, pursuant to Bar Rule II-15(e), filed a Petition for Formal Hearing with the Disciplinary Board. That petition alleged that Walton's use of Exhibit B in the amended complaint filed in Childs II violated: (1) DR 1-1]2(A) (4) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation); (2) DR 1-102(A) (5) (engaging in conduct prejudicial to the administration of justice); (3) DR 7-102(A) (1) (asserting a position that will obviously serve merely to harass or maliciously injure another); (4) DR 7-102(A) (3) (concealing or knowingly failing to disclose that which by law is required to be disclosed); (5) DR 7-102(A) (6) (participating in the creation of evidence that is obviously false); (6) DR 7-106(C)

---

[4] *See* Memorandum In Opposition To Defendents' Motion to Dismiss, p. 3, 4, 9. It bears noting that the ABA's Petition For Formal Hearing alleges only that Walton should be disciplined for his conduct in connection with the amended complaint (i.e., Exhibit B), and makes no mention of the opposition memorandum filed by Walton (i.e., Exhibit K).

[5] Walton was indicted for violating AS 11.30.300, but the indictment was subsequently dismissed because of numerous improperties that occurred during the grand jury proceedings.

(1) (alluding to a matter that has no reasonable basis of support in relevant admissible evidence); and (7) Alaska Bar Rule II-9 (obstructing the administation of justice).

On October 7, 1980, Walton filed his Response to Petition for Formal Hearing. Although in effect admitting that he had created Exhibit B, Walton denied that it was ever intended or represented to be "a true and correct copy of an existing document." He further denied that his conduct was unethical or that he had violated any disciplinary rule.

On August 5 and 6, 1981, a hearing was held by a Hearing Committee pursuant to Bar Rule II-15(f). In its Report, the Hearing Committee concluded that Walton had violated DR 1-102(A) (4) (intentional misrepresentation), DR 1-102(A) (5) (engaging in conduct prejudicial to the administration of justice) and DR 7-102(A) (1) (asserting a position where it is obvious that such would serve merely to harass the opposing party). The Committee's recommended discipline was to publicly censure Walton.

After learning of the contents of the Hearing Committee's Report, counsel for Walton and for the ABA agreed not to appeal the findings and recommendations to the Disciplinary Board. They further agreed to waive the submission of briefs and oral argument.

On August 28, 1981, the disciplinary Board issued its Findings of Fact and Recommendations. The Board's findings differed from those of the Hearing Committee. First, in addition to the violations found by the Hearing Committee, the Board found that Walton violated DR 7-102(A) (3) (concealing or knowingly failing to reveal what Walton was legally required to disclose), DR 7-102(A) (6) (participating in the creating of obviously false evidence), DR 7-106(C) (1) (stating a matter before the tribunal that Walton had no reasonable basis to believe was supported by admissible evidence) and Bar Rule II-9 (obstructing the administration of justice). Second, the Board recommended suspending Walton from the practice of law for eighteen months and that he reimburse the ABA for reasonable costs and attorney's fees, pursuant to Bar Rule II-15(j).

On September 8, 1981, Walton moved that the board

reconsider its findings and recommendations. The motion was denied and the matter is now before this court.

I. DUE PROCESS CLAIMS

We have previously stated that when an attorney is "subject to suspension or disbarment, the disciplinary proceedings must conform to the requirements of due process under both the federal and Alaska constitutions." *In re Robson*, 575 P.2d 771, 773-4 (Alaska 1978). Walton contends that he has been denied due process in a number or respects. We will address these assertions individually.

A. COMMMINGLING OF FUNCTIONS BY RULE AND PRACTICE

The due process clauses of both the federal and Alaska constitutions require that a disciplinary hearing be conducted before an impartial tribunal. *McGinnis v. Stevens*, 543 P.2d 1221, 1228 (Alaska 1975). Walton first argues that the Alaska Bar Rules allocate responsibility in disciplinary matters in such a way that there is an impermissible commingling of prosecutorial and adjudicatory functions. Rule II-13(c) provides:

> The Board shall have the power and duty:
>
> (1) To appoint a State Bar Disciplinary Administrator (hereinafter referred to as "Administator").
>
> (2) To supervise the investigation of all complaints against lawyers and to supervise the Administrator and his or her staff.
>
> (3) To retain legal counsel.
>
> (4) To hear appeals from the recommendations of Hearing Committees, and to modify the findings of fact, conclusions of law or proposed orders of Hearing Committees, regardless of whether there has been an appeal to the Board, and without regard to the discipline recommended by the Hearing Committee.

Rule II-14(a) states that the Administrator serves at the pleasure of the Board, and further provides that the Administrator shall:

(7) In his discretion, prosecute complaints and appeals...

...

(10) Keep the Board fully informed about the progress of all matters in his charge.

(11) Perform other duties set forth herein or assigned by the Board.

According to Walton, the above rules make the Board in effect both prosecutor and judge, which, he claims, is unconstitutional.

Due process requires some separation between those persons prosecuting the complaint and those adjudicating it; the prosecutor, who has a "probable partiality," should not be in a position to influence the decision makers. *In re Robson*, 575 P.2d 771, 774 (Alaska 1978). There may, however, be some combination of these functions within a particular agency. In *In Re Cornelius*, 520 P.2d 76, 83-4 (Alaska 1974), we stated:

> There is...no merit to the claim that the combination of functions of the state bar attorney, alleged to be that of complainant, prosecutor and adjudicator, violated due process or AS 44.62.630. The combination of investigative and judicial functions within an agency does not violate due process; a board may make preliminary factual inquiry on its own in order to determine if charges should be filed.

Similarly, in *In re Hanson*, 532 P.2d 303, 306 (Alaska 1975), we held that the rules of the Commission on Judicial Qualifications, which allowed the Commission both to conduct a preliminary investigation and to adjudicate facts, did not violate due process. In light of these precedents, we are not persuaded that the alocation of responsibility under the aforementioned sections of Rule II-13 and Rule II-14 violate due process.

This does not mean that proceedings conducted pursuant to the above Rules are immune from constitutional attack. In *In re Robson*, 575 P.2d 771 (Alaska 1978), we held that the presence of Bar Counsel during the Disciplinary Board's deliberations violated the respondent's due process rights, even

though Bar Counsel had not participated in the actual prosectuion of the case before the hearing committee, or taken an active part in the Board's deliberations. *Id.* at 773-75.

Walton's claim of impropriety in the instant case is directed at the role played by Karen Hunt, the ABA's then President.[6] Bar Rule II-15(a) states that the President shall select members of Hearing Committees, subject to the Board's ratification. In addition, as a member of the Board of Governors, the President is a member of the Disciplinary Board. Bar Rule II-13(a). Hunt, among other things, acknowledged receipt of Walton's Motion for Reconsideration of the Board's findings and recommendations, and denied Walton's Motion for Continuance, an action that was later ratified by the Board. Walton is correct that Hunt's performance of these administrative duties aligned her with the adjudicatory arm of the ABA. The only alleged commingling of roles by Hunt, however, is based on the assertion that she once intended to represent the ABA in the proceedings before this court.

Apparently because it was suggested by Walton that her representation of the ABA might pose a conflict of interest, Hunt never appeared on behalf of the ABA. The ABA was represented before this court by John R. Lohff, a private practitioner acting as Bar Counsel. While it may have been poor judgment for Hunt to have even considered representing the ABA before this court, we do not think that her having done so was sufficient to taint the proceedings. Her action certainly falls fail short of the impropriety that was held to violate due process in *In re Robson,* 575 P.2d at 773-775. Accordingly, Walton's due process argument, based upon commingling of functions, failed.

---

[6] Walton briefly indicates that there is an "internal record memorandum file" available to the attorney prosecuting the disciplinary matter, the Bar Association and the Board, but not available to him. Walton's request for access to the file was denied apparently on the grounds that it was privileged work product and because the Bar Rules do not provide for such disclosure. Since the record fails to demonstrate that any member of the Board had access to the file, we elect not to consider this issue.

B. NON-APPEARANCE BEFORE THE BOARD

Walton contends that the board's departure from the Hearing Committee's findings and recommendations without calling for briefs or oral argument denied him due process. The Bar Rules expressly afforded Walton the right to submit briefs to the Board and to appear before it for oral argument. Bar Rule II-15(i). Walton chose not to, however, and instead, with counsel for the ABA, waived appeal to the Board as well as oral argument and submission of briefs. Bar Rule II-13(c)(4) confers upon the Board the power and duty

> to modify the findings of fact, conclusions of law or proposed orders of Hearing Committees, regardless of whether there was an appeal to the Board, and without regard to the discipline recommended by the Hearing Committee.

We believe that the Rules clearly afforded Walton an opportunity to be heard by the Board. Furthermore, since Walton was on notice that the Board might depart from the Hearing Committee's findings and recommendations, whether or not there was an appeal, Walton waived his right to be heard, by entering into the stipulation.

C. MEMBERSHIP OF BOARD

Before these disciplinary proceedings were initiated, the district attorney sought an indictment against Walton for the same conduct at issue here. The indictment was dismissed because of improprieties occurring before the grand jury. No further indictment was sought. At the time the District Attorney's Office was prosecuting Walton, Elizabeth Kennedy, one of the members of the Disciplinary Board, was employed by the Department of Law in the civil section of the Attorney General's Office. Walton claims that the Disciplinary Board was, therefore, improperly constituted.

In support of his argument, Walton cites Canon 3C(1)(b) of the Code of Judicial Conduct, which states that a judge should recuse himself when "a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter." However, even if the code of Judicial Conduct applies to members of the Disciplinary Board, we

do not believe that the entire Department of Law should be considered one law office, or that all attorneys employed thereby should be considered to be practicing law together for purposes of Canon 3C(1) (b). Although within the same department, the Attorney General's Office and the District Attorney's Office operate separately, and there is no indication that Kennedy had any part in the prosecution of Walton. Thus, the disciplinary Board was not improperly constituted. *Cf. Keel v. State,* 552 P.2d 155 (Alaska 1976) (former assistant district attorney not disqualified from acting as judge in a criminal action).

D. STANDARD OF PROOF

According to Walton, the required standard of proof in this case is proof by "clear and convincing evidence." Proof by a mere preponderance, he argues, amounts to a denial of due process of law.

Alaska Bar Rule II-15(f) provides, partly: "The Administrator shall have the burden...of demonstrating by the preponderance of the evidence that the Respondent has, by act, or omission, committed an offense..." The use of this standard in bar disciplinary matters was approved by this court in *In re Robson,* 575 P.2d 771, 776-77 (Alaska 1978). Although the respondent in *Robson,* unlike Walton, did not argue that use of the preponderance standard violated his right to due process, Walton's argument in the present case fails to persuade us that he is entitled to be judged by a different standard.

Walton cites no authority holding that proof by clear and convincing evidence is required as a matter of federal due process, and we have found none.[7] Nor does the authority that

---

[7] Walton's argument fails to make clear whether he relies upon the due process guaranteed by the Alaska Constitution or that contained in the Constitution of the United States. The two guarantees are not necessarily the same. South Dakota v. Neville, 74 L.Ed.2d 748 (1983).

he cites persuade us that such is required under the state constitution.[8]

II. FABRICATION OF FALSE EVIDENCE

Walton contends that, as a matter of law, he did not create false evidence in violation of DR 7-102(A) (6), since, according to Walton, an unverified complaint is not evidence. The Bar Association contends that the term "evidence," in this context, should not be limited to its technical meaning under the Rules of Evidence. According to the ABA, DR 7-102(A) (6) should apply to any false document concerning a critical aspect of an ongoing lawsuit, produced by manipulations outside the courtroom.

Like the ABA, we believe that the term "evidence," in this context, was meant to apply to a broader category of items than those admissible at trial under the technical requirements of the Rules of Evidence. Documents attached to pleadings, although not always admissible evidence, are often relied upon by the court and counsel in matters of importance. Opposing counsel, for example, upon seeing a document such as the one in the case at bar, might well conclude that his client's position was untenable and so advise him, despite the fact that the document was fabricated. The danger is that others will be misled, to their detriment, with a potential for harm as great as if the item had been admissible at trial.

III. EVIDENCE OF WRONGDOING

Where, as here, findings of fact entered by the Disciplinary Board are challenged in this court, "the respondent attorney

---

[8] In re Hanson, 532 P.2d 303, 308 (Alaska 1975), held that proof by clear and convincing evidence is required in disciplinary proceedings against a judge, for alleged violations of the code of Judicial Conduct. Today's decision affirms a lesser standard of proof in attorney discipline cases. *Hanson*, however, was not based on due process grounds. Also, in *Hanson* the applicable statutes and rules contained *no* prescribed standard. *Id.* at 307. Here, there is a prescribed standard: proof by a preponderance of the evidence. Rule II-15(f), Alaska Bar R.

In light of today's ruling, we may be required to reevaluate our holding in *Hanson* if and when we are presented with another case involving disciplinary proceedings against a judge.

bears the burden of proof in demonstrating that such findings are erroneous." *In re Simpson,* 645 P.2d 1223, 1227 (Alaska 1982). And

> [t]hough this court has the authority, if not the obligation, to independently review the entire record in disciplinary proceedings, findings of fact made by the board are nonetheless entitled to great weight. The deference owed to such findings derives from the responsibility to conduct disciplinary proceedings which this court has delegated to the Bar Association.

Id. at 1226-1227.

Upon review of the entire record, we conclude that the findings of the Board, in all material respects, are supported by the evidence. The findings and recommendations of the Board are AFFIRMED. Respondent Peter B. Walton is ordered suspended from the practice of law for a period of eighteen months, effective 30 days after the publication date of our opinion. Respondent is ordered to comply with the requirements of Rule II-26, Alaska Bar Rules.

BEFORE THE DISCIPLINARY BOARD

ALASKA BAR ASSOCIATION

In the Disciplinary Matter)
Involving:)
)
PETER B. WALTON,)
)
Respondent-Attorney)
)

No. 78-13

FINDINGS OF FACT AND RECOMMENDTIONS
OF THE DISCIPLINARY BOARD
OF THE
ALASKA BAR ASSOCIATION

Based on the evidence received the Board makes the following findings:

1. Respondent PETER B. WALTON is, and at all times relevant to this proceeding has been, an attorney at law admitted to practice in the State of Alaska and a member of the Alaska Bar Association.

2. During an extended period, which included the period of April and May of 1978, the Respondent represented the Aleut Corporation in litigation against L. William Childs and Patricia A. Childs.

3. On April 14 and April 15 of 1978, in the manner described more fully below, the Respondent prepared a document which appeared to be a photocopy of a Deed of Trust executed on March 2, 1973, by L. William Childs and Patricia A. Childs as Trustors to Alaska Title Guaranty Company as Trustee for the benefit of the Aleut Corporation.

4. The document referenced in Finding 3 above was prepared by utilizing a photocopy of a Second Deed of Trust of the same date from which the Respondent deleted, by means of "white-out" or some other white obliterating liquid, the word "Second" from above the caption "Deed of Trust," a subordination provision reflecting that the Deed of Trust was second and subordinated to a Deed of Trust executed for the benefit of Alaska Mutual Savings Bank and all recording data, including graphite marks utilized by the recording office to highlight the seal of the notary public.

5. Preparation of the document reflected extreme care in the utilization of the whiting material, particularly in the vicinity of the notary seal, and in photocopying so that the alterations were not detectable.

6. Respondent attached the fabricated document which appeared to be photocopy of an actual First Deed of Trust as Exhibit B to an "Amended Complaint" and as Exhibit K to a "Memorandum in Opposition of Defendant's Motion to Dismiss or Motion for Summary Judgetment" prepared in conjunction with services rendered by the Respondent in the *Aleut Corporation v. Childs* cases.

7. In the text of the Amended Complaint, the document prepared by the Respondent and attached as Exhibit B was

described first as a "copy of that copy" of "the original Deed of Trust." Exhibit B was referenced numerous times in the Amended Complaint and none of the references was made with ambiguous language that could be construed to advise that the exhibit was a document created for illustrative purposes.

8. The memorandum to which the fabricated document was attached as Exhibit K referred to that exhibit three times, none of which references was in an ambiguous form that might be construed to advise that the document was recreated for illustrative purposes.[1]

9. Following preparation of the fabricated Deed of Trust and its attachment to the referenced pleadings, those pleadings were reviewed by Lee Holen, a law clerk performing services in the Respondent's offices on a contract basis, and after such review Ms. Holen expressed her concern to the Respondent that his description of the document might be misunderstood. That expression of concern was "brushed off" by the Respondent.

10. On April 25, 1978, copies of the pleadings to which the fabricated Deed of Trust was attached were served upon Hugh Gerald Wade, attorney for L. William Childs, after hours after by taxi to his home. The original pleadings were not filed with the court until May 4, 1978.

11. During the deposition of Frank Cowden, Vice President for the Aleut Corporation, on May 5, 1978, Cowden was asked by Child's attorney on direct examiniation if he had brought with him any document in compliance with a subpoena. Cowden produced the fabricated Deed of Trust with a communication from Respondent attached to it. This memorandum, prepared April 14, 1978, was produced with

---

[1] The Area Hearing Committee determined as follows:

> The Petition did not assert that the Respondent committed misconduct arising from submission of Exhibit K to the motion and the Area Hearing Committee took no action in that regard. The Committee determined, nevertheless, that utilization of the re-created document in conjunction with the Memorandum in Opposition to the Motion to Dismiss is properly considered as bearing upon the Respondent's intent.

The Board concurs with this determination.

an express waiver of the attorney-client privilege, despite opposing Counsel's statement that it need not be produced. It read:

> Dear Frank: Guess what? Here's the smoking gun. Either Childs falsely testified when he said he gave Lily a copy of his deed of trust on March 2nd, or he falsely testified when he said it hadn't been altered after executed it [sic]. But in that case he will have difficulty explaining why he concealed the fact of its alteration. Cheers, Peter Walton.

Nowhere in the memorandum does Respondent refer to the document as a fabrication.

12. During the deposition of Frank Cowden, Vice President for the Aleut Corporation, on May 5, 1978, following evasive testimony on direct examination which made it appear that the fabricated Deed of Trust attched as a copy of the pleadings was or may have been a copy of an actual Deed of Trust in the possession of the Aleut Corporation or the Respondent, the Respondent, through leading questions on cross-examination, elicited testimony to establish that the Deed of Trust attached as Exhibit B to the Amended Complaint and as Exhibit K to the memorandum was fabricated by the Respondent. At no time prior to this cross-examination did Respondent reveal by any oral or written communication that the "copy" of the Deed of Trust attached as an exhibit to various pleadings filed with the Court and delivered to opposing Counsel was, in fact, a fabricated document.

13. Respondent intended that the fabricated document attached to the Amended Complaint as Exhibit B would be understood to be a copy of an existing photocopy of an actual Deed of Trust. This finding is based upon the care exercised by Respondent in the preparation of the fabricated Deed of Trust, the precise nature of the references in the pleadings referring to the exhibit, the repeated references in the Amended Complaint and the Memorandum in Opposition to the Motion to Dismiss, Respondent's decision to ignore the warnings of a colleague regarding the possible misinterpretation of the references to the document, the text of the "smoking gun"

memorandum, Respondent's failure to notify opposing counsel or the court that the document was a fabrication, the findings set forth above and the record herein.

14. The document attached as Exhibit B to the Amended Complaint and Exhibit K to the Memorandum in Opposition to a Motion to Dismiss was not in the nature of an illustrative exhibit designed to demonstrate to the court or opposing counsel the Respondent's interpretation of the evidence or a theory of Respondent's that was supportable by evidence.

Based on the above findings the Board recommends the following:

CONCLUSIONS

1. Respondent violated Disciplinary Rule 1-102(A) (4) of the Code of Professional Responsibility by engaging in conduct involving intentional misrepresentation in that he intentionally misrepresented in pleadings served on opposing counsel and filed with the court that a document attached as an exhibit was a copy of an actual Deed of Trust when in fact it was fabricated by the Respondent.

2. Respondent violated Disciplinary Rule 1-102(A) (5) of the Code of Professional Responsibility by engaging in conduct prejudicial to the administration of justice.

3. Respondent violated Disiplinary Rule 7-102(A) (1) of the Code of Professional Responsibility by asserting a position (i.e., that a copy of an existing copy of an actual Deed of Trust was attached as an exhibit), when it was obvious that such action would serve merely to harrass the opposing party.

4. Respondent violated Disciplinary Rule 7-102(A) (3) of the Code of Professional Responsibility by concealing or knowingly failing to disclose that which he is required by law to reveal.

5. Respondent violated Disciplinary Rule 7-102(A) (6) of the Code of Professional Responsibility of participating in the creation of evidence when it was obvious that the evidence was false.[2]

---

[2] The Board does not consider the actual submission or admissibility of evidence as determinative of this issue. For example, a violation would occur if a lawyer impressed a murder victim's fingerprints on a gun, left the gun at the murder scene, departed and thereafter took no active role.

6. Respondent violated Disciplinary Rule 7-106(C) (1) of the Code or Professional Responsibility by stating a matter before a tribunal that he had no reasonable basis to believe was supported by admissible evidence.[3]

7. Respondent violated Alaska Bar Rule II-9.

RECOMMENDED DISCIPLINE

It is the recommendation of the Disciplinary Board that Respondent be suspended from the practice of law pursuant to Alaska Bar Rule II-12(b) for a period of eighteen months.

The recommendation of the Board is based upon the serious nature of Respondent's misconduct and not upon the number of disciplinary rules his conduct violated. It is the further recommendation of the Board that the court order that Respondent reimburse the Association for reasonable costs and attorney fees incurred herein pursuant to Bar Rule II-15(j) based upon the statement of costs and attorney fees submitted herewith.

RESPECTFULLY SUBMITTED by the Disciplinary Board of the Alaska Bar Association this 28th day of August, 1981.

---

[3] The Board concludes that an appearance before a tribunal may be in written as well as verbal form.

Andrew J. Kleinfeld
Chairman

Richard D. Savell
Recorder

Harold M. Brown

Mary K. Hughes

Elizabeth Page Kennedy

William B. Rozell

RABINOWITZ, Justice joined by MATTHEWS, Justice, dissenting.

I dissent from the majority's rejection of Walton's due process claim as it relates to the applicable burden of proof in bar disciplinary matters. I further dissent from the majority's affirmance of the disciplinary Board's findings of fact regarding Walton's alleged violation of the various Disciplinary Rules involved in this proceeding. Employing a clear and convincing burden of proof, my review of the record persuades me that the Bar has only demonstrated that Walton's conduct was both negligent and grossly negligent, thus violative of DR 1-102(A) (5) and (6). I would therefore impose the sanction of a public censure.

I. WHETHER THE "PREPONDERANCE OF THE EVIDENCE" STANDARD IS VIOLATIVE OF DUE PROCESS UNDER THE ALASKA CONSTITUTION.

Walton's position is that the use of a preponderance of the evidence standard called for by Alaska Bar rule II-15 violates due process under Alaska's Constitution in disciplinary proceedings, particularly in those proceedings in which fraudulent conduct is charged. In my view, the United States Supreme Court's decision in *Santosky v. Kramer*, 455 U.S. 745, 71 L.Ed.2d 599 (1982) furnishes persuasive support for Walton's position. In *Santosky*, the Court was called upon to determine whether the "preponderance of the evidence" or "clear and convincing" standard should be applied in parental rights termination proceedings. Applying the three factors enunciated in *Mathews v. Eldridge*, 424 U.S. 319, 335, 47 L.Ed.2d 18, 33 (1976), which governs a determination of what process is due under the Fourteenth Amendment in any given

fact situation,[1] the *Santosky* court concluded that the first factor, the importance of the individual interests at stake, dictated that a clear and convincing standard be applied:

> This Court has mandated an intermediate standard of proof — "clear and convincing evidence" — when the individual interests at stake in the state proceeding are both "particularly important" and "more substantial than mere loss of money." *Addington v. Texas,* 441 U.S., at 424, 60 L.Ed.2d 323, 99 S.Ct. 1804. Notwithstanding "the state's 'civil labels and good intentions,'" *id.,* at 427, 60 L.Ed.2d 323, 99 S.Ct. 1804, quoting *In Re Winship,* 397 U.S. at 365-366, 25 L.Ed.2d 368, 90 S.Ct. 1068, 51 Ohio Ops. 2d 323, the Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with a "a significant deprivation of liberty" or "stigma." 441 U.S., at 425, 426, 60 L.Ed.2d 323, 99 S.Ct 1804. *See e.g., Addington v. Texas, supra,* (civil commitment); *Woodby v. INS,* 385 U.S. at 285, 17 L.Ed.2d 362, 87 S.Ct. 483 (deportation); *Chaunt v. United States,* 364 U.S. 350, 353, L.Ed.2d 120, 81 S.Ct. 147 (1960) (denaturalization); *Schneiderman v. United States,* 320 U.S. 118, 125, 159, 87 L.Ed. 1796, 63 S.Ct. 1333 (1943) (denaturalization).

---

[1] The *Eldridge* court observed:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
>
> 424 U.S. at 335, 47 L.Ed.2d at 33.

455 U.S. 745, 71 L.Ed.2d 599 at 608-09. I think it apparent that the individual interests at stake in a bar disciplinary proceeding are "particularly important and more substantial that the mere loss of money" to the attorney involved. The proceedings stigmatize the attorney and threaten him with a significant deprivation of liberty.

The second *Eldrige* factor, whether the Bar Rule's chosen standard creates a risk of error, again weighs in favor of adopting the clear and convincing evidence standard. This is evidenced by the facts of the instant case. If Walton is indeed innocent of the allegations made against him, the risk of wrongful discipline would be significantly reduced by using the clear and convincing evidence standard.

Concerning the third *Eldridge* factor, it is clear that the state has an interest in protecting society from attorneys who have violated bar disciplinary rules.[2] The Supreme Court has characterized the preponderance of the evidence standard as placing the risk of error equally upon the parties. When adopting the clear and convincing evidence standard in *Addington v. Texas*, 441 U.S. 418, 427, 60 L.Ed.2d 323 (1978), the Supreme Court stated "[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." The dispositive inquiry thus becomes whether the potential injury to the attorney from an incorrect

---

[2] A principal purpose of attorney disciplinary proceedings is protection of the public and maintenance of the integrity of the judicial system. *See*, In re Kleindeist, 644, P.2d 249, 256 (Arz. 1982) (en banc) ("[d]iscipline against an attorney has two purposes: (1) to protect the public from unethical attorneys; and (2) to deter other attorneys from engaging in unethical conduct"); District of Columbia Bar v. Kleindeinst, 345 A.2d 146, 148 (D.C. App. 1975) (per curiam) (a purpose of disciplinary action is partly to maintain integrity of profession in eyes of public); State v. Scott, 639 P.2d 1131, 1134 (Kan. 1982) (per curiam) ("disciplinary proceedings...are a species unto themselves which cannot be characterized as either a civil action or a criminal proceeding...Although the errant attorney may receive punishment, the purpose of these proceedings is primarily for the protection of the courts, the legal profession, and the general public from those who have been lacking in professional responsibility.").

determination of a violation of the disciplinary rules is "significantly greater" than the possible harm to the state caused by: (1) an incorrect determination that an attorney has not violated the rules, and (2) the increased burden on the state of meeting the higher standard of proof. In my view, the potential injury to the attorney is significantly greater, and therefore I would hold that due process under Alaska's Constitution requires the use of the clear and convincing standard rather than the preponderance of the evidence standard.[3]

---

[3] Thirty-one states and the District of Columbia use the clear and convincing standard. *See*, for example:

Alabama	Hunt v. Disciplinary Board of Alabama State Bar, 381, So.2d 52 (Ala 1980).
Arizonza	Matter of Rubi, 652 P.2d 1014 (Ariz. 1982).
California	Price v. State Bar of California, 638 P.2d 1311 (Cal. 1982) ("convincing proof to a reasonable certainty").
Colorado	People v. Howard, 364 P.2d 380, (Colo. 1961) ("Substantial, clear, convincing and satisfactory").
Delaware	In re Morford, 80 A.2d 429 (Del. 1951).
D.C.	Matter of Thorup, 432 A.2d 1221 (D.C. 1981).
Florida	The Florida Bar v. Ragano, 403 So.2d 401 (Fla. 1981).
Hawaii	Disciplinary Board of Hawaii Supreme Court v. Kim, 583, P.2d 333, (Ha. 1978) ("and beyond reasonable doubt").
Illinois	In re Jafree, 444 N.E.2d 143 (Ill. 1982).
Iowa	Committee on Professional Ethics and Conduct of Iowa State Bar Association v. Thompson, 328, N.W.2d 520 (Iowa 1983) ("convincing preponderance").
Kansas	State v. Scott, 639 P.2d 1131 (Kan. 1982) ("substantial, clear, convincing and satisfactory").
Louisiana	Louisiana State Bar Association v. Mitchell, 375 So.2d 1350 (1979).
Maine	National Center for Professional Responsibility, State Disciplinary Enforcement Systems Structural Survey 61 (1980).
Maryland	Attorney Grievance Commission of Maryland v. Kerpelman, 438 A.2d 501 (Md. 1981).
Minnesota	In re Gillard, 271 N.W.2d 785 (Minn. 1978).
Mississippi	Netterville v. Mississippi State Bar, 397 So.2d 878 (Miss. 1981).
Montana	Matter of Goldman, 588 P.2d 964 (Mont. 1978) (attorney has burden "to show that charges are not sustained by convincing proof and to a reasonable certainty").
Nevada	Copren v. State Bar, 183 P.2d 833 (Nev. 1947).

II. EVIDENCE OF WRONGDOING

Review of the Disciplinary Board's findings, pursuant to the standards articulated in *In Re Simpson*, 645 P.2d 1223, 1227 (Alaska 1982), has convinced me that Walton did not intend to deceive. On the other hand, I conclude that the evidence in the record clearly and convincingly demonstrates that Walton's conduct was both negligent and grossly negligent. He should have known that the language used in the amended complaint — "a copy of a copy" — would be taken to mean

---

New Hampshire	Edes' Case, 395 A.2d 498 (N.H. 1978).
New Jersey	In re Sears, 364 A.2d 777 (N.J. 1976).
New Mexico	In re Sedillo, 498 P.2d 1353 (N.M. 1972).
N. Carolina	Matter of Palmer, 252 S.E.2d 784 (1979).
North Dakota	Matter of Lovell, 292 N.W.2d 76 (N.D. 1980).
Oregon	In re Conduct of Paauwe, 654 P.2d 1117 (Ore. 1982).
Rhode Island	Carter v. Walsh, 406 A.2d 263 (R.I. 1979).
S. Carolina	In re Friday, 208 S.E.2ds 535 (S.C. 1974).
South Dakota	In re goodrich, 98 N.W.2d 125 (S.D. 1959).
Utah	In re McCullough, 95 P.2d 13 (Utah 1939) (convincing proof and fair preponderance").
Virginia	Tenth District Committee of Virginia State Bar v. Baum, 193 S.E.2d 698 (Va 1973).
W. Virginia	Committee on Legal Ethics of West Virginia State Bar v. Pence. 240 S.E.2d 668 (W. Va. 1977) ("full, clear, and preponderating evidence").
Wisconsin	Matter of Sedor, 245 N.W.2d 895 (Wis. 1976).
Wyoming	State Board of Law Examiners v. Goppert, 205 P.2d 124 (Wyo. 1949).

See also the Model Rules for Lawyer Disciplinary Enforcement, ABA Standing Committee on Professional Discipline and the National Center for Professional Responsibility (1979). Rule 17C of these model rules provides as follows:

> *Standard of Proof.* Formal charges of misconduct, petitions for reinstatement, and petitions for transfer to and from disability inactive status shall be established by clear and convincing evidence.

a photocopy. He thus violated DR1-102(A) (5) and (6).[4]

Given my conclusion that Walton did not intend that the fabricated document would be taken to be a photocopy of an existing document, it follows that Walton did not violate DR 1-102(A) (4) (intentional misrepresentation); DR 1-102(A) (1) (asserting a position merely to harass); DR 7-102(A) (3) (concealing or knowingly failing to disclose that which should be revealed); or DR 7-102(A) (6) (creation of false evidence). In addition, I think the record demonstrates that Walton did believe he could prove that an alteration along the lines of the exhibit he prepared had been accomplished by Childs.

My reasons for the foregoing conclusions are the following:

1. Walton did not use the fabricated document in the deposition of Childs even though it was in existence at that time. If he had had any intent of using the document as evidence it would seem that he would have confronted Childs with it.

2. It is difficult to understand what Walton had to gain by foisting the fabricated copy off as an actual photocopy. It is undisputed that the document Childs recorded was materially different than the document Childs signed. That is all that the fabricated document, if it were taken to be real, would demonstrate.

3. There was little chance of any deception succeeding. Walton did not surreptitiously fabricate the document but did so in the presence of Cowden and of Lee Holen, a contract law clerk. The record is not clear on whether other people were present, but is clear that opposing counsel, Wade, had heard that Walton had been using some white-out and a xerox machine in connection with the case, before Wade even received the fabricated document.

---

4. DR 1-102(A) (5) and (6) read as follows:

MISCONDUCT

(A) A lawyer shall not:

...

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

4. When ambiguous responses were given by Cowden at his deposition (which was taken only one day after the fabricated document had been filed with the court) Walton promptly elicited the truth of the matter on cross examination.[5]

5. The care exercised by Walton in preparing the exhibit says as much about Walton's compulsive nature as about any

---

[5] Further, at the evidentiary hearing counsel for the Bar Association, while clearly leaving room for the local disciplinary board to find intentional conduct, suggested that what was involved was unintentional conduct: "Now I would suggest that the conduct of Mr. Walton was misrepresentation. Prehaps at the most generous an accidental misrepresentation, but it still amounted to a misrepresentation to the court." [Tr 220] "Now whether there was a specific intent to deceive the bar association doesn't intend to say yes, there was a specific intent to deceive, though some of the allegations in the petition might be read to say that. ' [Tr. 222]..."Now clearly as is reported and is responded to by the second trial brief from Mr. Boyko on behalf of Mr. Walton, the case of *State v. Nicklaus* is a far more serious case of misstatements to a court system but the principle still applies and is still approved by this court. The serious misleading in pleadings is disciplinary — is a basis for discipline — disciplinary matter of something for which the bar association has brought Mr. Walton to this proceeding and something for which I suggest that you should find is a basis for discipline of Mr. Walton. There is a spectrum of appropriate penalties based on the indication of intent to deceive in the case law. Clearly in the cases where there is a strong indication of an intent to deceive and a continuing pattern of deception both before a court and the hearing committee following it, it is a far stronger basis for suspension and disbarment. The evidence is not here clear that there is an intentional deception on the part of Mr. Walton, except that he intentionally included this document in his pleadings and intentionally used the language that he did. As to whether he intended to deceive the court there's very litle evidence of that except that again he intentionally included it in the pleadings which were filed with the court. Obviously when faced with it or when the question about these documents became apparent he took steps to clear up the matter, and whatever you believe about his other actions, this certainly should be considered in his behalf. But he placed in the ocurt basket downstairs two pleadings which referred to 2-2 times to the same exhibit, and actually many more times but added the same exhibit twice. And that exhibit was a copy of a copy or an exhibit for which he talked about, which was not anything but what he'd built together out of his belief from Mr. Childs' testimony but it's something he added, pled and mistaken language, of poor judgment language, but it amounted to deception and interference with justice and a basis for discipline. Thank you."

intent to deceive.

6. Walton's "decision to ignore the warnings of a colleague regarding the possible misinterpretation of the referenced to the document" is again equally consistent with innocence as with guilt.

7. The "smoking gun" memorandum was a memo from Walton to Cowden to which the exhibit was attached. It stated, "Dear Frank: Guess what? Here's the smoking gun. Either Childs falsely testified when he said he gave Lily a copy of his deed of trust on March 2nd, or he falsely testified when he said it hadn't been altered after [executing] it. But in that case he will have difficulty explaining why he concealed the fact of its alteration. Cheers, Peter Walton." The memo was not a communication to the court or opposing counsel. It was a communication to a client that could be clarified subsequently. It does not constitute evidence of any intent to mislead the court or opposing counsel.

8. The fabricated document was attached to the amended complaint. It appears that the motion to dismiss was of no particular consequence and that Walton was told by Wade before the opposition was filed that Wade was going to withdraw the motion to dismiss.[6]

---

[6] The foregoing paragraphs numbered 6 through 8 are in reference to the Disciplinary Board's findings of fact that:

> Respondent intended that the fabricated document attached to the Amended Complaint as Exhibit B would be understood to be a copy of an exhisting photocopy of an actual Deed of Trust. This finding is based upon the care exercised by Respondent in the preparation of the fabricated Deed of Trust, the precise nature of the references in the pleadings referring to the exhibit, the repeated references in the Amended Complaint and the Memorandum in Opposition to the Motion to Dismiss, Respondent's decision to ignore the warnings of a colleague regarding the possible misinterpretation of the references to the document, the text of "smoking gun" memorandum, Respondent's failure to notify opposing counsel or the court that the document was a fabrication the findings set forth above and the record herein.

III. SANCTION

Given my conclusion that the evidence clearly and convincingly shows that Walton violated DR 1-102(A) (5) (conduct prejudicial to the administration of justice) and DR 1-102(A) (6) (conduct that adversely reflects on his fitness to practice law), I would issue a public sensure.

APPENDIX II

IN THE SUPREME COURT OF THE STATE OF ALASKA

In the Disciplinary Matter Involving:	)	
PETER B. WALTON,	)	Supreme Court No. 6289
	)	ORDER
Respondent-Attorney	)	

Before: Burke, Chief Justice, Rabinowitz, Matthews, Compton, Justices, and Carpeneti, Superior Court Judge. [Moore, Justice, not participating].

On consideration of the petition for rehearing and the substitute personal statement by Peter B. Walton, lodged October 10, 1983 and filed October 28, 1983,

IT IS ORDERED:

The petition for rehearing is granted in part, Opinion No. 2734, filed on September 30, 1983, is amended by striking out pages 17, 18 and 19 and replacing them with the attached pages 17, 18, 19, 19a, 19b and 19c. In all other respects, the petition for rehearing is denied.

Entered by direction of the court at Anchorage, Alaska on January 3, 1984.

CLERK OF THE SUPREME COURT

ROBERT D. BACON

[Rabinowitz and Matthews, Justices, dissent. They would grant the petition for rehearing for the reasons stated in their dissenting opinion filed September 30, 1983].

ATTACHMENT TO ORDER

ccs: Justices; Counsel; The Honorable Walter L. Carpeneti; Pro Tem; West Publishing Company; Todd Commications, Inc.; All Opinion Subscribers.

Only one of the cases cited by Walton for the proposition that due process requires proof by clear and convincing evidence before an attorney may be disciplined actually concerned attorney discipline,[7] and that case did not even address the standard of proof issue, much less require proof by clear and convincing evidence.[8] A review of the leading cases and consideration of the important policy issues involved here leave us convinced that requiring proof by a preponderance of the evidence — rather than a higher standard — does not violate Walton's due process rights.

Santosky v. Kramer, 455 U.S. 745, 71 L.Ed.2d 599 (1982), provides the analytical framework for the burden of proof issue. In *Santosky*, which concerned termination of parental rights, the Court held that the proper standard of proof could be determined by the "balancing process," 455 U.S. at 754, 71 L.Ed.2d at 607, established in *Mathews v. Eldridge*, 424 U.S. 319, 335, 47 L.Ed.2d 18, 33 (1976). In that process the court must weigh the private interest involved in any given proceeding against the public's interest, and determine whether, given the relative strengths of those interests, the risk of error of an incorrect factual decision should be evenly borne or should be placed more heavily upon the public. If, because the individual's interest is greater than the public's, the risk should be placed more heavily upon the public, then a higher

---

[7] Walton relies principally on Santosky v. Kramer, 455 U.S. 745, 71 L.Ed.2d 599 (1982); Addington v. Texas, 441 U.SA. 418, 60 L.Ed.2d 323 (1979); and Mathews v. Eldridge, 424 U.S. 319, 47 L.Ed.2d 18 (1976). *Santosky* concerned termination of parental rights. *Addington* termination of disability benefits under the social Security Act. For the reasons discussed below, these cases do not persuade us that due process requires proof by clear and convincing evidence in attorney discipline cases.

[8] In re Ruffalo, 390 U.S. 544, 20 L.Ed.2d 17 (1968).

standard of proof must be used.

The private interest in the present case is Walton's interest in practicing law, which is his livelihood, and his interest in protecting the integrity of his name. These are weighty interests indeed. The public interest in the present case is the public's interest in a fair and accurate judicial system, which requires that lawyers working within it act with integrity and honesty. This interest, like Walton's, is a substantial one.

This court cannot conclude, as Walton asks us to do, that his interest in practicing law and in his reputation is so much more substantial than the public's interest in a fairly and accurately functioning judicial system that we should adopt a standard of proof which puts the risk of an incorrect factual determination on the public. Lawyers are licensed by the state (through this court) to engage in activities affecting the public from which others are excluded. Their licensing includes a certification of fitness to hold the trust and confidence of the public at large, including potential clients as well as potential adversaries. The harm which would be caused by a lawyer acting unethically is substantial. Under all of these circumstances, we are unwilling to hold that the risk of an incorrect factual determination in a bar disciplinary proceeding should be placed primarily in the public. Because there are substantial interests on both sides, the risk of error[9] should be borne equally. That is accomplished by use of the preponderance of the evidence standard. Due process demands no more.

Thus, we reject Walton's position that proof by clear and convincing evidence is required as a matter of federal due process.[10] Nor does the authority that he cites persuade us that

---

[9] The risk of error, in any event, should be low. There are extensive procedural protections which surround bar disciplinary proceedings. *See, e.g.*, Alaska Bar Rules II-15(f), (h), (i), (j), and II-22.

[10] Walton's argument fails to make clear whether he relies upon the due process guaranteed by the Alaska constitution or that contained in the Constitution of the United States. The two guarantees are not necessarily the same. South Dakota v. Newville, 74 L.Ed.2d 748 (1983).

such is required under the state constitution.[11]

II. FABRICATION OF FALSE EVIDENCE

Walton contends that, as a matter of law, he did not create false evidence in violation of DR 7-102(A) (6), since, according to Walton, an unverified complaint is not evidence. The Bar Association contends that the term "evidence," in this context, should not be limited to its technical meaning under the Rules of Evidence. According to the ABA, DR 7-102(A) (6) should apply to any false document concerning a critical aspect of an ongoing lawsuit, produced by manipulations outside the courtroom.

Like the ABA, we believe that the term "evidence," in this context, was meant to apply to a broader category of items than thos admissible at trial under the technical requirements of the Rules of Evidence. Documents attached to pleadings, although not always admissible evidence, are often relied upon by the court and consel in matters of importance. Opposing counsel, for example, upon seeing a document such as the one in the case at bar, might well conclude that his client's position was untenable and so advise him, despite the fact that the document was fabricated. The danger is that others will be misled, to their detriment, with a potential for harm as great as if the item had been admissible at trial.

III. EVIDENCE OF WRONGDOING

Where, as here, findings of fact entered by the Disciplinary Board are challenged in this court, "the respondent attorney bears the burden of proof in demonstrating that such findings

---

[11] In re Hanson, 532 P.2d 303, 308 (Alaska 1975), held that proof by clear and convincing evidence is required in disciplinary proceedings against a judge, for alleged violations of the Code of Judicial Conduct. Today's decision affirms a lesser standard of proof in attorney discipline cases. *Hanson*, however, was not based on due process grounds. Also, in *Hanson*, the applicable statutes and rules contained *no* prescribed standard. *Id.* at 307. Here, there is a prescribed standard: proof by a preponderance of the evidence. Rule II-15(f), Alaska Bar R.

In light of today's ruling, we may be required to reevaluate our holding in *Hanson* if and when we are presented with another case involving disciplinary proceedings against a judge.

are erroneous." *In Re Simpson*, 645 P.2d 1223, 1227 (Alaska 1982). And,

> [t]hough this court has the authority, if not the obligation, to independently review the entire record in disciplinary proceedings, findings of fact made by the Board are nonetheless entitled to great weight. The deference owed to such findings derives from the responsibility to conduct disciplinary proceedings which this court has delegated to the Bar Association.

Id. at 1226-1227.

Upon review of the entire record, we conclude that the findings of the Board, in all material respects, are supported by the evidence. The findings and recommendations of the Board are AFFIRMED. Respondent Peter B. Walton is ordered suspended from the practice of law for a period of eighteen months, effective 30 days after the publication date of our opinion. Respondent is ordered to comply with the requirements of Rule II-26, Alaska Bar Rules.

IN THE SUPREME COURT FOR THE STATE OF ALASKA

In the Disciplinary Matter)
Involving:)
)
PETER B. WALTON,)
)
_____)

Case No. 6289

NOTICE OF APPEAL

COMES NOW Robert H. Wagstaff, counsel for Peter Walton, and gives notice of appeal to the Supreme Court of the United States from this Court's Opinion on Rehearing No. 2734 dated January 3, 1984. This appeal is taken pursuant to 28 USC 1257(2).

DATED this 2nd day of March, 1984, at Anchorage, Alaska.

ROBERT H. WAGSTAFF
Attorney for Peter Walton

S/ _____
Robert H. Wagstaff

I certify that a copy of the foregoing was served by mail on March 2, 1984 by mailing copies to JOHN LOHFF and STEPHEN VAN GOOR.

S/ _____

IN THE SUPREME COURT FOR THE STATE OF ALASKA

In the Disciplinary Matter Involving:	)
PETER B. WALTON,	)
	)

Case No. 6289

CERTIFICATE OF SERVICE

COMES NOW Robert H. Wagstaff, a member of the Bar of the Supreme Court of the United States, and certifies that on March 2, 1984 he filed a Notice of Appeal to the Supreme Court of the United States herein, and served by mail Stephen Van Goor, and John Lohff, counsel for the Alaska Bar Association.

DATED this 2nd day of March, 1984, at Anchorage, Alaska.

ROBERT H. WAGSTAFF
Attorney for Peter Walton

S/ _____
Robert H. Wagstaff

Office - Supreme Court, U.S.
FILED
JUN 13 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1611

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

PETER WALTON,
Appellant,

vs.

ALASKA BAR ASSOCIATION,
Appellee.

On Appeal From the Supreme Court of the State of Alaska

MOTION TO DISMISS OR AFFIRM

SUSAN A. BURKE
COUNSEL OF RECORD
AVRUM M. GROSS
GROSS & BURKE
424 North Franklin
Juneau, Alaska 99801
(907) 586-2777
Counsel for Appellee

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

I

Introduction 1

II

Proceedings below 2

III

The Alaska Supreme Court was correct in holding that a preponderance of evidence standard in attorney discipline proceedings does not violate due process 7

IV

Walton's equal protection claim must be dismissed because he failed to adequately raise the claim before the Alaska Supreme Court and because the claim is totally without merit 19

V

Conclusion 28

TABLE OF AUTHORITIES CITED

Cases

Page

Addington v. Texas, 441 U.S. 418 (1979) 8, 9, 10, 13, 16, 18, 19
Associated Engineers & Contractors, Inc. v. H. & W. Construction Co., 438 P.2d 224 (Alaska 1968) 23
Bailey v. Anderson, 325 U.S. 203 (1945) 20
Cardinale v. Louisiana, 394 U.S. 437 (1969) 20
Dunn v. Blumstein, 405 U.S. 330 (1972) 25
Exxon Corporation v. Eagerton, ... U.S. ....., 76 L.Ed.2d 497 (1983) 20
Fairview Development, Inc. v. City of Fairbanks, 475 P.2d 35 (Alaska 1970) 23
F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) 25
In Re Hanson, 532 P.2d 303 (Alaska 1975) 19, 22
In Re Ruffalo, 390 U.S. 544, reh. denied, 391 U.S. 961 (1968) 8
In Re Winship, 397 U.S. 358 (1970) 8
Lewis v. State, 469 P.2d 689 (Alaska 1970) 23
Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978) 15
Paul v. Davis, 424 U.S. 693 (1976) 14
Santosky v. Kramer, 455 U.S. 745 (1982) 10, 11, 12, 13, 14, 16, 18
Saxton v. Harris, 395 P.2d (Alaska 1964) 19
Schneiderman v. United States, 320 U.S. 118 (1943) 13
Shapiro v. Thompson, 394 U.S. 618 (1969) 25
Steadman v. SEC, 450 U.S. 91, reh. denied, 451 U.S. 933 (1981) 18, 19
Vance v. Bradley, 440 U.S. 93 (1979) 26
Vance v. Terrazas, 444 U.S. 252 (1980) 18
Webb v. Webb, 451 U.S. 493 (1981) 20, 21, 23, 24
Woodby v. INS, 385 U.S. 276 (1966) 13

TABLE OF AUTHORITIES CITED

Constitution

	Page
United States Constitution:	
Fifth Amendment	18
Fourteenth Amendment	1, 21, 28
Alaska Constitution:	
Article I, section 1	24
Article IV, section 5	26
Article IV, section 6	26

Rules

Alaska Bar Rule:	
Rule 13(c)(5)	7, 17
Rule 15(d)	17
Rule 15(e)	17
Rule 22	17
Rule 27	14
Supreme Court of the U.S. Revised Rule 16.1(b)	20

No. 83-1611

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

PETER WALTON,
Appellant,

VS.

ALASKA BAR ASSOCIATION,
Appellee.

On Appeal From the Supreme Court of the State of Alaska

MOTION TO DISMISS OR AFFIRM

I

INTRODUCTION

Peter Walton has appealed to this Court from a decision of the Alaska Supreme Court suspending him from the practice of law for a period of 18 months. *Disciplinary Matter Involving Walton,* 676 P.2d 1078 (Alaska 1984). Walton seeks review of that decision on two grounds. First, he claims that the Alaska Bar Rules, which provide that disputed issues of fact in attorney disciplinary proceedings be resolved by a preponderance of evidence standard, denied him Due Process of Law under the Fourteenth Amendment of the United States Constitution. Second, Walton claims that since the standard of proof for judicial disciplinary

proceedings in Alaska is "clear and convincing" evidence, that standard must also be used in attorney discipline proceedings. In Walton's view, use of a preponderance of the evidence standard in the disciplinary proceedings against him violated his right to equal protection of the laws.

Walton's appeal should be dismissed, or alternatively the decision of the Alaska Supreme Court should be summarily affirmed. The procedural rights under Alaska's attorney disciplinary rules are more than adequate to safeguard the federally protected interests of attorneys charged with professional misconduct. Due process of law does not, as Walton claims, require "clear and convincing" proof for attorney discipline. Walton's equal protection claim was not adequately presented to the Alaska Supreme Court. As a result, the Alaska Court did not pass upon or even address this issue. Accordingly, it may not be raised for the first time on appeal to this Court. Moreover, since judicial disciplinary proceedings involve interests that are substantially different in nature and weight from those at issue in attorney discipline cases, the application of a higher standard of proof for judges does not deny attorneys equal protection of the laws.

II

PROCEEDINGS BELOW

The facts which gave rise to this disciplinary proceeding are described in detail in the Alaska Supreme Court decision. 676 P.2d at 1079-81. We will briefly summarize those facts here. On March 2, 1973, William Childs, then an employee of the Aleut Corporation, borrowed $13,000 from

the corporation. He signed a promissory note on that date in the amount of $13,000, which provided that the loan was secured by a deed of trust. There was in fact a deed of trust recorded on October 9, 1973, which had been executed on March 2, 1973 from Childs to the corporation, but it was not a first deed of trust. Instead, the recorded document was described in its title as a "second" deed of trust, and the body of the document contained a clause subordinating the rights of the Aleut Corporation to another deed of trust held by the Alaska Mutual Savings Bank. The subordination clause described the deed of trust to the bank, which secured a $47,400 Loan, as having been executed on March 5 and recorded on March 6, 1973. Since the note and deed of trust to the bank had been executed three days *after* the date Childs had signed the original deed of trust in favor of the Aleut Corporation, it was obvious that the deed of trust to the corporation dated March 2 must have been altered after its execution.

Initially, the Aleut Corporation had brought suit against Childs in 1975 to resolve disputes concerning the terms of Childs' employment agreement with the corporation. Peter Walton represented the Aleut Corporation in that litigation. On April 13, 1978, Walton took Childs' deposition, and in the course of the deposition he questioned Childs concerning the $13,000 loan and the deed of trust securing that loan. Childs testified that he had signed the promissory note and deed of trust to the Aleut Corporation on March 2, 1973, and had given copies of those documents to the corporation. He denied that the deed of trust had been altered after he signed it. (Tr. 69) On April 21, 1978, however, at the continuance of his deposition, Childs stated prior to questioning that he wished to change his original testi-

mony; that in fact the deed of trust had been altered and that he knew of that alteration prior to recording the deed. (Childs' Deposition, 4/21/78, at 1.)

On April 14, 1978, one day after Childs' first deposition and seven days *before* Childs admitted the alteration, Walton fabricated a document which he later represented was a copy of an unaltered first deed of trust which Childs had given to the Aleut Corporation. Working from a Xerox copy of the "second" deed of trust that in fact had been recorded, Walton "whited out" the word "second," the subordination clause, the recording data, and the notary seal, and then Xeroxed the document as altered. The result was a Xerox copy of what appeared to be a "first" deed of trust which contained no subordination clause. (Tr. 48-49; Tr. 127; Tr. 186.)

On April 25, 1978, Walton prepared and filed an amended complaint on behalf of the corporation against Childs, alleging that Childs had obtained a $13,000 loan from the corporation some five years previously; that Childs and his wife had executed a first deed of trust on March 2, 1973, and had given a copy of that document to the corporation; that Childs had retained the original of the document; and that he had thereafter altered it prior to recording so that it now appeared to be a "second" deed of trust. (Plfs. Exh. 4.) The complaint contained several allegations concerning the contents of the deed of trust which was originally signed on March 2, 1973. For example, the complaint stated:

> On its face, the original Deed of Trust (*of which a copy is attached marked Exhibit B*) appeared to be a first Deed of Trust, not secondary to any other lien on the subject property. (Emphasis added.)

The complaint further stated that Childs and his wife:

> executed a Deed of trust for the benefit of the plaintiff corporation and delivered a copy thereof to the president and secretary of the plaintiff corporation. *A copy of that copy is attached hereto marked as Exhibit B.* (Emphasis added.)

The document that Walton attached as Exhibit B was a copy of a deed of trust apparently signed by Childs and his wife, but containing no subordination clause, no notary seal, no recording data and no references to "second," in its title. (Plfs. Exh. 4.)

Although the numerous references to Exhibit B in the complaint suggested that it was a copy of an existing document in the corporation's possession, no such document could be found in the corporation's files, and no one then employed by the corporation even remembered the circumstances surrounding the loan itself. (Tr. 174; 176) In fact, the Exhibit B described in and attached to the amended complaint was the deed of trust which had been fabricated by Walton on April 14, 1978. This fabricated "copy" was filed with the superior court and served on opposing counsel. (Plfs. Exh. 4.)

The circumstances of the fabrication of Exhibit B were disclosed to opposing counsel at the deposition of one of the corporation's vice presidents taken approximately one week after the filing of the amended complaint. At that deposition and *before* Walton made his disclosure, a memorandum was produced which had been written by Walton and given to the corporate vice president. That memorandum (to which the fabricated "first" deed of trust was attached) stated:

> Dear Frank: Guess what? Here's the smoking gun. Either Childs falsely testified when he said he gave Lily

> a copy of his deed of trust on March 2 or he falsely testified when he said it hadn't been altered after executing it. But in that case he will have difficulty explaining why he concealed the fact of its alteration. Cheers, Peter Walton.

(Plfs. Exh. 6, p. 15.)

Walton did not deny having created Exhibit B. His only contention was that he had not intended for anyone to believe that it was more than simply an "illustration" of what the deed of trust had once looked like, before Childs had allegedly altered it. (Tr. 128.)

The Hearing Committee of the Alaska Bar Association heard testimony from the attorney who had represented William Childs, a law clerk who had worked with Walton preparing the litigation, and from Walton himself. The Committee also had before it the deposition of the corporate vice president who received the "smoking gun" memorandum. On the issue of intent, the Hearing Committee concluded that Walton had in fact intended to deceive when he fabricated the deed of trust. That Committee found:

> Respondent intended that the re-created document attached to the amended complaint as exhibit B would be understood to be a copy of an existing photocopy of a Deed of Trust. This finding is based upon the care exercised by respondent in the preparation of the re-created Deed of Trust, the pleading referring to the exhibit, the repeated references in the Amended Complaint and the Memorandum in Opposition to the Motion to Dismiss, Respondent's decision to ignore the warnings of a colleague regarding the possible misinterpretation of the references to the document and Respondent's failure to notify opposing counsel imme-

diately when he became aware that opposing counsel understood the exhibit to be represented as a copy of an existing Deed of Trust.

The Board of Governors of the Alaska Bar Association, sitting as the Disciplinary Board in review of the Hearing Committee's report, also rejected Walton's contention that he created Exhibit B only as an "illustration" of the theory of his case. The Disciplinary Board found additional support for this finding in the text of the "smoking gun" memorandum, and also in the fact that Walton failed promptly to notify either opposing counsel or the superior court that the document was a fabrication. The Disciplinary Board recommended that Walton be suspended from practice for 18 months.

In accordance with Alaska Bar Rule 13(c)(5), the Disciplinary Board forwarded its findings and recommendations to the Alaska Supreme Court. The Alaska Court upheld those findings and rejected all of Walton's due process claims, including the standard of proof claim that he now brings to this Court for review.

III

THE ALASKA SUPREME COURT WAS CORRECT IN HOLDING THAT A PREPONDERANCE OF EVIDENCE STANDARD IN ATTORNEY DISCIPLINE PROCEEDINGS DOES NOT VIOLATE DUE PROCESS

Walton contends that federal due process prohibits Alaska from applying a standard of proof in attorney discipline proceedings less stringent than the "clear and convincing" test. In fact, however, previous decisions of this Court have held only that attorneys are entitled to the basic procedural safeguards in disciplinary proceedings—fair notice of the alleged misconduct and an opportunity to

be heard. *In Re Ruffalo,* 390 U.S. 544, reh. denied, 391 U.S. 961 (1968). Walton has cited no decision from this or any other court holding that federal due process requires any specific standard of proof in attorney disciplinary proceedings, much less a standard of "clear and convincing" proof. Instead, Walton relies on a series of unrelated decisions of this Court requiring an elevated standard of proof for certain limited types of proceedings—proceedings that are vastly different from those at issue here.

We will briefly review those decisions in order to demonstrate first that Walton's reliance on them is totally misplaced and second that attorneys' constitutional rights in attorney disciplinary proceedings are adequately protected by the preponderance of evidence standard.

In *In Re Winship,* 397 U.S. 358 (1970), this Court held that due process mandated proof beyond a reasonable doubt in proceedings where a juvenile was threatened with a finding of delinquency. The Court rejected arguments that delinquency proceedings were essentially "civil" in nature. Noting that a juvenile adjudged to be a delinquent may be "'subjected to the loss of liberty for years,'" the Court found these proceedings to be "'comparable in seriousness to a felony prosecution.'" *Id.,* at 366 (citation omitted). The Court held that the similarity of consequences demanded a similar burden of proof.

The next case to address the standard of proof required under the Due Process Clause was *Addington v. Texas,* 441 U.S. 418 (1979). The issue in *Addington* was whether involuntary commitment for an indefinite term to a mental institution required more than proof by a preponderance

of evidence to satisfy federal due process. Initially, the Court described the analysis for determining the appropriate standard of proof in these terms:

> In considering what standard should govern in a civil commitment proceeding, we must assess both the extent of the individual's interest in not being involuntarily confined indefinitely and the state's interest in committing the emotionally disturbed under a particular standard of proof. Moreover, we must be mindful that the function of legal process is to minimize the risk of erroneous decisions.

Id., at 425.

The Court then concluded that indefinite confinement in a mental institution obviously constituted "a significant deprivation of liberty," to say nothing of the social consequences of that commitment on the individual. On the other hand, the Court recognized that the state had legitimate interests both in providing care to emotionally disturbed citizens and in protecting the community from "the dangerous tendencies of some who are mentally ill." *Id.*, at 426. In striking the balance between these interests, the Court observed that the peculiar nature of mental commitment proceedings (which, in that case, involved resolution of factual disputes by a jury) increased the risk of error in the factfinding process:

> At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable. Obviously, such behavior is no basis for compelled treatment and surely none for confinement. However, there is the possible risk that a fact-

> finder might decide to commit an individual solely on a few isolated instances of unusual conduct . . . . [or] idiosyncratic behavior. Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps reduce the chances that inappropriate commitments will be ordered.

Id., at 427.

Balancing all of these factors, the Court concluded that the individual's interests in commitment proceedings were "of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of evidence." *Id.*, at 427. The Court went on to hold that at a minimum, such proof must be "clear and convincing."

A third case relied on by Walton is *Santosky v. Kramer*, 455 U.S. 745 (1982). At issue in *Santosky* was whether New York was constitutionally prohibited from terminating parental rights on the basis of a preponderance of evidence standard. Once again the Court undertook to weigh and balance three factors—the private interests affected by such a proceeding, the countervailing governmental interests at stake, and finally, the magnitude of the risks and consequences of an erroneous termination of parental rights. In this particular type of proceeding, the Court recognized that there were several separate and distinct "private" interests: those of the parents, those of the child, and those of the foster parents seeking to adopt the child. Turning first to the interests of the natural parents, the Court found their interest "serious" and even "fundamental":

> [A] natural parent's "desire for and right to 'the companionship, care, custody, and management of his

> or her children' " is an interest far more serious than any property right . . . When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that *fundamental liberty interest,* but to end it . . . .
>
> . . . Few forms of state action are both so severe and so irreversible.

Id., at 759 (citations omitted; emphasis added). The Court also concluded that children, like their parents, have an equally "vital interest in preventing erroneous termination of their natural relationship" (*id.,* at 760); and noted the far reaching consequences to the child from the loss of that relationship. *Id.,* at 760, n.11. By contrast, the interests of the foster parents were not directly implicated in the outcome of the proceeding. At worst, the state's failure to prove its case could cause further "delay and uncertainty until their foster child is freed for adoption." On balance, the Court found that this disparity in consequences "strongly favors heightened procedural protections." *Id.,* at 761.

Assessing the risk of error in the proceeding, the Court found that because of the nature of parental rights termination proceedings, there were several factors present in those proceedings that considerably increased the risk of erroneous factfinding. First, the imprecise standards that govern those proceedings were found to be "unusually open to the subjective values of the judge." *Id.,* at 762. Further, because parents faced with termination proceedings are "often poor, uneducated, or members of minority groups," the Court found that these proceedings were "often vulnerable to judgments based on cultural or class bias." *Id.,* at 763. The risk of error in this particular type of case was

further magnified by the fact that the "state's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense." *Id.* The Court found that "[c]oupled with a 'preponderance of evidence' standard, these factors create a significant prospect of erroneous termination." *Id.*, at 764. In light of the severity of the consequences to the parent of an erroneous termination in contrast to the "uneasy status quo" that results from a failure by the state to prove its case, the Court found that a preponderance of the evidence standard, which allocates the risk of error nearly equally between the parties, did not properly reflect the vast disparity in the consequences.

Even the government's interests in cases involving parental rights—preserving and promoting the welfare of the child and reducing the costs of termination proceedings—were found to be consistent with a stricter standard of proof than preponderance of evidence. A stricter standard would not appreciably increase the costs or burdens to the state. At the same time, since the state had *no* interest in separating children from *fit* parents, it was as much in the state's interests as in the parents' interests to promote accuracy in the determination of whether the parents were capable and willing to provide a normal home. The Court, accordingly, held that the "logical conclusion of this balancing process is that the 'fair preponderance of the evidence' standard . . . violates the Due Process Clause of the Fourteenth Amendment," and further that "a 'clear and convincing evidence' standard of proof strikes a fair balance between the rights of the natural parents and the State's legitimate concerns." *Id.*, at 769.

Addington and *Santosky* are significant in that they represent the *only two instances* where this Court has invalidated on *constitutional* grounds a state's choice of the standard of proof to be applied in proceedings that are undeniably "civil" in nature.[1] The factors, however, which were paramount to the *constitutional* issues in those cases—the fundamental individual liberty interests and the significant risks of error inherent in mental commitment and parental termination proceedings—are simply not present in this case.

The interests of an individual attorney in a professional disciplinary proceeding are twofold. First, a suspension or termination of an attorney's license to practice law interferes with his or her livelihood and is likely to engender financial loss. Second, a finding of misconduct sufficient to warrant public sanctions may affect the attorney's reputation. These are undoubtedly serious interests, which is why this Court has held that they are entitled to basic due process protections of notice and hearing. It is quite another matter, however, to suggest, as does appellant, that interference with or deprivation of these interests is comparable to involuntary confinement in a state mental institution or to permanent termination of the parent-child relationship. Unlike a commitment proceeding, suspension of a profes-

---

[1]In *Woodby v. INS*, 385 U.S. 276 (1966), and in *Schneiderman v. United States*, 320 U.S. 118 (1943), this Court adopted a clear and convincing standard for deportation proceedings and for denaturalization proceedings. In both cases the federal statutes governing those proceedings were silent as to the burden of proof to be applied. Neither of those cases, however, purported to involve constitutional rulings. And *Winship*, of course, involved proceedings that were not "civil"at all, despite the "civil" label traditionally applied to juvenile delinquency proceedings.

sional license in no way affects one's fundamental right to freedom of movement, nor does an attorney's interest in reputation or pursuit of a profession rise to the 'fundamental liberty interest" of parents to enjoy a natural relationship with their children.[2] Moreover, suspension or revocation of an attorney's license to practice law under Alaska's rules does not inevitably involve a *permanent* loss as does parental termination—a factor that weighed heavily in favor of a higher standard of proof in *Santosky*. An attorney under suspension may, under the Alaska Bar Rules, apply for reinstatement at any time; even a disbarred attorney may make such an application after five years. Significantly, the burden of proof imposed upon the suspended or disbarred attorney to show his or her fitness to resume the practice of law[3] is the same standard required for disciplinary action—proof by a preponderance of evidence.

The Alaska Supreme Court, in assessing the private interests at stake in attorney discipline proceedings found those interests to be "weighty." However, due process does not necessarily require clear and convincing proof simply because the proceedings affect "weighty" individual interests. As the Alaska Court correctly noted, a balance must be struck between the individual interests and other considera-

---

[2]Indeed, one's interest in reputation alone is not even cognizable under the federal Constitution. *Paul v. Davis*, 424 U.S. 693 (1976).

[3]Specifically, Rule 27 of the Alaska Bar Rules requires an applicant for reinstatement to demonstrate "that he has the moral qualifications, competency and learning of law required for admission to practice law in this state and that his resumption of the practice of law . . . will be neither detrimental to the integrity and standing of the Bar or the administration of justice nor subversive of the public interest."

tions—specifically the governmental interests in the proceeding and the likelihood that a preponderance of the evidence standard will create a significant risk of error in the factfinding process.

In *Ohralik v. Ohio State Bar Association,* 436 U.S. 447 (1978), this Court recognized that the state's interests in the professional conduct of attorneys are "particularly strong." The Court described the nature of those interests in this way:

> In addition to its general interest in protecting consumers and regulating commercial transactions, the State bears a special responsibility for maintaining standards among members of the licensed professions. . . . "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice and have historically been 'officers of the courts.' " . . . While lawyers act in part as "self-employed businessmen," they also act "as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes."

Id., at 460 (citations omitted).

The state has an obvious and significant interest in the fair and effective administration of justice; that interest, in turn, requires a high degree of confidence on the part of courts, clients, and attorneys that the rules of conduct prescribed under the Canons of Professional Responsibility will be honored. A preponderance of evidence standard in attorney discipline matters promotes public confidence in the high ethical conduct of attorneys. Judges and opposing counsel working in the justice system constantly rely on representations by attorneys. That reliance may well be

eroded if attorneys may continue to practice law undisciplined where the demonstration of their ethical misconduct may not be "clear and convincing," but still shows that the unethical acts "more likely than not" took place.

The potential harm to the administration of justice from unethical attorneys is extremely serious; the potential harm to individual clients is enormous. Given the increasing complexity of legal problems in our society, clients must be willing to place their total trust in their attorneys to protect not just their financial interests, but a host of fundamental liberty interests ranging from marriage and child custody in civil cases to personal freedom in criminal cases. That trust, of necessity, will be limited if clients know that even attorneys who "more likely than not" engage in unethical conduct still are licensed by the state to advise them.

Moreover, there is no reason to believe, as there was in *Addington* and *Santosky,* that the preponderance of evidence standard in attorney discipline cases creates an undue risk of error in the factfinding process. For one thing, unlike the rules of conduct at issue in mental commitment and parental rights termination proceedings, the rules of conduct for attorneys are clear. Indeed, knowledge of the Canons of Professional Responsibility is a condition of being admitted to practice in the first instance. Because the rules are clearly understood, there is little danger that, as in *Santosky,* the subjective values of the factfinders will play a role in the factfinding process. Nor are cultural or class biases likely to affect the factual determination. The Hearing Committees under Alaska Bar Rule 15(b) are composed of both attorneys and nonattorneys—a composition that

serves to bring special expertise to the factfinding panel while at the same time reducing the risk that individual values may undermine the accuracy of the factfinding process. Nor can there be any serious concern that the Bar Association's ability to pursue a discipinary action or its access to the facts is any greater than the attorney's access to those facts or his ability to mount a defense.

Given these factors, there is small likelihood of error in the factfinding process. Consequently, a clear and convincing standard of proof will have little impact on the reduction of what is already an insignficant risk of error.[4] When that minimal risk of error is balanced with the relative equality of the interests of the individual and the state, it is clear that the Alaska Supreme Court correctly concluded that a standard of proof which allocates the risk of error more or

---

[4]The full panoply of procedural safeguards afforded to attorneys under the Alaska Bar Rules contributes as well to minimizing those risks even further. For example, if an attorney facing formal disciplinary action believes he cannot obtain a fair and impartial hearing before any member of the Hearing Committee, the attorney is entitled to peremptorily challenge that member by filing an affidavit alleging that belief. Rule 15(d). Charges of misconduct must be in writing, must set forth "with specificity the charge of misconduct," and must be personally served on the attorney. Rule 15(e). At the hearing the attorney is entitled to be represented by counsel, to examine and cross-examine witnesses, to have subpoenas issued in his behalf. Rule 15(f). If the attorney cannot afford counsel, he may request that counsel be appointed for him at the Alaska Bar Association's expense. Rule 22. The findings of the Hearing Committee are reviewed by the Board of Governors of the Alaska Bar Association, sitting as the Disciplinary Board. And if that Board recommends that the attorney be disbarred, suspended or publicly censured, the Disciplinary Board's findings and recommendations must be reviewed further by the Alaska Supreme Court. Rule 13(c)(5).

less equally between the parties does not violate federal due process.

Even when important individual interests are involved, this Court has approved the application of the preponderance of evidence standard so long as *fundamental* liberties such as those in *Addington* and *Santosky* are not at stake. For instance, in *Vance v. Terrazas,* 444 U.S. 252 (1980), this Court rejected the argument that due process under the Fifth Amendment was violated by the application of a preponderance of evidence standard in expatriation proceedings initiated by the State Department. The Court reached this conclusion despite the fact that in previous cases it had recognized and even "stressed the importance of citizenship and evinced a decided preference for requiring clear and convincing evidence to prove expatriation." *Id.*, at 266. Similarly, in *Steadman v. SEC,* 450 U.S. 91, reh. denied, 451 U.S. 933 (1981), the Court held that Congress had intended that the preponderance of evidence standard generally applicable under the Administrative Procedures Act should apply in disciplinary proceedings against securities brokers under the antifraud provisions of the federal securities laws. The Court affirmed the suspension of a broker's license for violating those provisions, and observed that in adopting a preponderance of evidence standard:

> Congress was free to make that choice, Vance v. Terrazas, 444 U.S., at 265-66, and *in the absence of countervailing constitutional restraints,* the courts are not free to disturb it.

Id., at 104 (emphasis added).

The interests at stake in attorney discipline cases are no more substantial than those of a person facing expatriation,

and are virtually identical to the interests of the disciplined broker in *Steadman*.[5] Walton has failed to demonstrate that the application of the preponderance of evidence standard in state proceedings to discipline attorneys raises a substantial federal question.

IV

WALTON'S EQUAL PROTECTION CLAIM MUST BE DISMISSED BECAUSE HE FAILED TO ADEQUATELY RAISE THE CLAIM BEFORE THE ALASKA SUPREME COURT AND BECAUSE THE CLAIM IS TOTALLY WITHOUT MERIT

Walton has also asked this Court to rule that the preponderance of evidence standard applicable to attorney discipline proceedings in Alaska violates equal protection of the laws because while Alaska uses a preponderance of evidence standard for attorney discipline proceedings, judicial disciplinary proceedings are governed by the clear and convincing standard of proof.[6] Like his due process claim,

---

[5]Walton's subsidiary contention that due process at a minimum requires that allegations of fraud be proved by clear and convincing evidence has absolutely no support in the decisions of this or any other court. While this Court noted in *Addington* that "some jurisdictions" use the clear and convincing standard in civil cases involving fraud, the use of that elevated standard in civil fraud cases is by no means universal. In fact, in Alaska, preponderance of evidence is the standard in those cases. *Saxton v. Harris*, 395 P.2d (Alaska 1964). But in any event, none of the cases cited by Walton involved a constitutional ruling mandating the higher standard.

[6]The basis for Walton's claim is the decision of *In Re Hanson*, 532 P.2d 303 (Alaska 1975)—the first case in Alaska to involve the question of the standard of proof in judicial disciplinary proceedings. Since neither statute nor rule specified the standard of proof for such proceedings, it was necessary for the court to supply one. Citing the serious nature of proceedings which may deprive an individual of a public office, the court adopted the clear and convincing standard for judicial discipline.

Walton's equal protection claim fails to raise a substantial federal question. Moreover, the claim is subject to dismissal because it was not adequately raised before the Alaska Supreme Court.

This Court has consistently held that it is without jurisdiction to consider federal claims that were not properly raised or passed upon in state court proceedings. *Bailey v. Anderson,* 325 U.S. 203, 206-07 (1945); *Cardinale v. Louisiana,* 394 U.S. 437 (1969); *Webb v. Webb,* 451 U.S. 493 (1981); *Exxon Corporation v. Eagerton,* ..... U.S. ....., 76 L.Ed.2d 497, 504 n. 3 (1983). This doctrine is incorporated in Rule 16.1(b) of the Revised Rules of the Supreme Court of the United States, which provides:

> The Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate nonfederal basis.

The record in this case clearly demonstrates that Walton did not adequately raise a federal equal protection claim before the Alaska Supreme Court. This failure is evident both from the absence of any mention of equal protection in either the majority or dissenting opinions of the Alaska Supreme Court in this case, as well as from a review of the cursory manner in which Walton dealt with the issue in his written arguments to that court.

Neither the majority nor the dissenting opinion even mentions, let alone passes upon, the issue of whether an attorney disciplined under a different standard of proof than that applied in judicial disciplinary proceedings is

denied equal protection under the United States Constitution. This Court in *Webb v. Webb* discussed this precise situation and commented:

> This Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." Street v. New York, 394 U.S. 576 (1969); see also Fuller v. Oregon, 417 U.S. 40, 50, n. 11 (1974); Chambers v. Mississippi, 410 U.S. 284, 290, n. 3 (1973); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945).

451 U.S. at 495.

It is clear from the record that the reason the Alaska Court did not address an alleged federal equal protection violation in this case was because Walton did not adequately raise that claim. The only mention of "equal protection" anywhere in the voluminous written briefs that Walton presented to the Alaska Supreme Court is found in the following paragraph of his opening brief:

> In *Hanson,* this Court cited the Supreme Court of Texas in the matter of *In Re Laughlin:*
>
> > "The serious nature of the proceeding depriving one of a public office . . . ought at the very least to require proof by clear and convincing evidence." 265 S.W.2d at 809.
>
> The same argument can be made with regards to attorneys. The same quantum of evidence should apply to judges and lawyers as the same basic issues are involved. To do any less denies attorneys the equal protection of the law.

(Appellant's Br. at 50.)

There was no citation to the federal Equal Protection Clause of the Fourteenth Amendment, no citation to any

relevant federal authority, no argument of the issue, and no further mention of equal protection anywhere else in the opening brief. Not surprisingly, the brief presented on behalf of the Alaska Bar Association contained no discussion of equal protection. This omission was not noted in Walton's reply brief; indeed, that brief contained no mention of equal protection whatsoever.

Moreover, after the Alaska Supreme Court had decided the case, Walton sought rehearing. He made no reference in his petition to the fact that the court's opinion failed to address equal protection. Walton's only reference in that pleading to the standard of proof for *judicial* discipline was to question whether it was appropriate for "a two justice and one superior court judge majority to attempt to overrule *In Re Hanson*, 532 P.2d 30 (1975) . . .".[7] In a separate motion, Walton urged that his petition for rehearing be heard by the "five duly appointed justices of the Supreme Court of Alaska." After noting the majority's suggestion that the court may be required to reevaluate the clear and convincing standard of proof adopted in *Hanson* in an appropriate case in the future, Walton went on to observe, "Under the majority's opinion, there presently exists a different standard for judges than for lawyers.

---

[7]Walton had argued in support of his due process claim that the individual interests in attorney discipline proceedings were the same as those involved in judicial discipline proceedings. Addressing this argument, the majority opinion noted:

> In light of today's ruling we may be required to reevaluate our holding in *Hanson* if and when we are presented with another case involving disciplinary proceedings aaginst a judge.

676 P.2d at 1085, n. 11.

As is argued in Respondent's Brief, this phenomenon is definitionally a denial of the equal protection of the law." Once again there was no citation of authority nor any indication that Walton had expected the Alaska Court actually to rule on an equal protection claim.

These two cursory references to "equal protection" in Walton's opening brief and in the motion accompanying his petition for rehearing were not sufficient under state law to have raised that issue before the Alaska Supreme Court. That court has consistently held that under Alaska Appellate Rule 212, it will not consider or rule on an issue where the issue is given no more than cursory treatment in the argument portion of the brief. *See, e.g., Fairview Development, Inc. v. City of Fairbanks*, 475 P.2d 35, 36 (Alaska 1970); *Lewis v. State*, 469 P.2d 689, 691 n.2 (Alaska 1970); *Associated Engineers & Contractors, Inc. v. H. & W. Construction Co.*, 438 P.2d 224, 228 (Alaska 1968). Under Alaska law, Walton's failure to properly present his equal protection argument to the Alaska Supreme Court constituted an abandonment of that claim, requiring no discussion of the claim in the court's opinion.

Quite apart from Walton's failure to present the equal protection issue adequately under state law, it is equally clear that he did not expressly raise a *federal* claim. Where it is not clear from the record that a party was relying on *federal* constitutional provisions rather than on state law or state constitutional provisions, this Court has held that it is without jurisdiction to review the claim. As the Court stated in *Webb:*

> At a minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.

451 U.S. at 501 (emphasis in original). Since Alaska's constitution also contains an equal protection provision,[8] there is no way that the Alaska Supreme Court could have known whether Walton's mention of "equal protection" was intended to refer to his rights under the Alaska Constitution or under the federal Constitution. Since this record fails to show that a *federal* claim was even mentioned, let alone adequately presented to the Alaska Supreme Court, Walton's equal protection claim is again subject to dismissal.

Even if Walton *had* presented his equal protection claim adequately, it would be subject to dismissal because it is so without merit that it fails to raise a substantial federal question. Our earlier discussion of the due process factors also addresses the nature of the individual rights and interests that are potentially affected by the application of a preponderance of evidence standard in attorney discipline proceedings. Whatever the importance of those interests, it is clear that they do not involve "fundamental" constitutional rights such as the right to vote or the right to interstate travel which may be infringed or penalized only where necessary to further a compelling state interest. *See, e.g.,*

---

[8]Article I, section 1, of the Alaska Constitution provides in part:

> [A]ll persons are equal and entitled to equal rights, opportunities, and protection under the law.

Dunn v. Blumstein, 405 U.S. 330 (1972) (right to vote); *Shapiro v. Thompson,* 394 U.S. 618 (1969) (right to travel).

In the absence of any infringement of or penalty imposed on a *fundamental* right, a state law or rule that distinguishes between citizens of a state is valid under the Equal Protection Clause of the United States Constitution if it rests "on some ground of difference having a fair and substantial relationship to the object of the legislation." *F.S. Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920). In this case, there are obvious and substantial grounds of difference between the potential harm and impact to the respective public and individual interests at stake in judicial and attorney disciplinary proceedings. These differences provide ample justification under the Equal Protection Clause for the application of a more stringent standard of proof for judicial discipline.

The most obvious difference between judicial and attorney disciplinary proceedings lies in the fact that judicial disciplinary proceedings may result in removing a judge from public office. Judicial discipline results in a uniquely high degree of public opprobrium because of the nature of that office. The fact that an attorney has been disciplined may or may not become widely known outside of lawyer and judicial circles. The very nature of judicial office, however, ensures that discipline against a judge will inevitably receive widespread and visible coverage in the media. Beyond this public opprobrium, judicial discipline also threatens loss of salary, position and other emoluments of high public office, none of which are implicated in attorney discipline.

Moreover, the public has a special interest in seeing that its public officials are not lightly removed from office. In Alaska, judges are appointed by the Governor, acting as a representative of the people of the state.[9] A judge's continuance in office must be approved by a majority vote of the electorate in periodic retention elections.[10] Removal of a judge from office in effect nullifies the Governor's initial choice and the choice of the voters who have voted to retain that judge in office. A clear and convincing standard of proof in judicial discipline proceedings serves to protect that important public interest—an interest that does not even come into play in attorney discipline proceedings.

It is equally obvious that misconduct serious enough to warrant judicial discipline is likely to result as well in disciplinary action against the judge's license to practice law. Thus, to the extent that there are similar individual interests at stake in judicial and attorney disciplinary proceedings—primarily interests in reputation and in pursuing a particular profession—those interests are similar only in *nature*. The potential adverse impact on the judge's interests is twice as severe as the impact on the attorney's interests. The attorney may lose his or her license to practice law. The judge may lose that license and a high public office as well.

In *Vance v. Bradley*, 440 U.S. 93 (1979), a statute providing for mandatory retirement at age 60 for Foreign Service personnel was challenged on equal protection grounds. This Court upheld the statute despite the fact that the mandatory retirement age for other federal employees was 70. The

---

[9]Alaska Constitution, art. IV, sec. 5.

[10]Alaska Constitution, art. IV, sec. 6.

Court found that a lower retirement age for Foreign Service employees was rationally related to certain government goals that applied only to the Foreign Service—namely, to insure the mental and physical competence of public servants who perform tasks critical to our foreign relations under difficult and demanding conditions in overseas posts. In this case, the clear and convincing standard for judicial discipline is rationally related to legitimate state goals which have no application in the case of attorney discipline. The differences in both the nature of the respective interests of judges and attorneys and in the severity of the consequences of disciplinary action to those respective interests provide a rational basis for applying differing standards of proof. A more stringent standard of proof in judicial discipline does not deny equal protection of the laws to an attorney faced with disciplinary proceedings.

V

CONCLUSION

Walton's claim that use of a preponderance of the evidence standard is a violation of due process does not raise a substantial federal question. The disciplinary proceedings against Walton afforded him every procedural safeguard required under the Due Process Clause of the United States Constitution. Past decisions of this Court require no more than that. There is no reason for this Court to give this claim plenary consideration. It should be dismissed or alternatively, the decision of the Alaska Supreme Court should be summarily affirmed.

It is equally clear that this case does not involve a substantial federal claim under the Equal Protection Clause of the Fourteenth Amendment. This claim, which was not passed on by the Alaska Supreme Court, should be dismissed not only because it fails to raise a substantial federal question, but because it was not adequately raised below.

Respectfully submitted,

Susan A. Burke
COUNSEL OF RECORD
Avrum M. Gross
Counsel for the
Alaska Bar Association

Office - Supreme Court, U.S
FILED
JUL 2 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1611

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PETER WALTON, *Appellant*

v.

ALASKA BAR ASSOCIATION, *Appellee*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

REPLY TO MOTION TO DISMISS OR AFFIRM

ROBERT H. WAGSTAFF
912 West Sixth Avenue
Anchorage, Alaska 99501
(907) 277-8611
Counsel for Appellant

GCIU

QUESTIONS PRESENTED

1. Does the due process clause of the Fourteenth Amendment to the Constitution of the United States require that when fraud is alleged in attorney discipline proceedings proof must be by clear and convincing evidence?

2. Does the equal protection clause of the Fourteenth Amendment to the Constitution of the United States require that proof be by clear and convincing evidence in attorney discipline proceedings when the standard of proof in judicial disciplinary proceedings is by clear and convincing evidence?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CASES AND AUTHORITIES ii

APPELLEE'S DESCRIPTION OF THE PROCEEDINGS BELOW DEMONSTRATES THE CONSTITUTIONAL NEED FOR A STANDARD OF CLEAR AND CONVINCING EVIDENCE IN ATTORNEY DISCIPLINE PROCEEDINGS 1

THE PREPONDERANCE OF EVIDENCE STANDARD IN ATTORNEY DISCIPLINE PROCEEDINGS VIOLATES DUE PROCESS 7

EQUAL PROTECTION IS INEXTRICABLY INTERTWINED WITH DUE PROCESS IN THE CONTEXT OF THIS CASE AND WAS RAISED BELOW 9

CONCLUSION 13

APPENDIX 1

TABLE OF CASES AND AUTHORITIES

CASES: *Page*

Addington v. Texas, 441 U.S. 418 (1979) 5, 9
Bank of Pocahontas v. Ferimer, 161 Va. 37, 170 S.E. 591, (1933) 9
Bowe v. Gauge, 127 Wis. 245, 106 N.W. 1074 (1906) 9
Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment, 347 U.S. 590 (1954) 10, 11
Bryant v. Zimmerman, 278 U.S. 63 (1928) 11
Cohen v. Hurley, 366 U.S. 117 (1961) 2
Ellis v. Dixon, 349 U.S. 458 (1955) 11
In Re Griffiths, 143 U.S. 717 (1973) 5
In Re Hanson, 532 P.2d. 303 (Alaska 1975) 10
In Re Laughlin, 265 S.W.2d 805 (Tex. 1954) 9
In Re Ruffalo, 390 U.S. 544 (1968) 8
Netterville v. Mississippi State Bar, 397 So.2d 878 (Miss.1981) 7
Nishikawa v. Dulles, 356 U.S. 129 (1958) 8
Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978) 2
Polk v. Dodson, 454 U.S. 312 (1981) 5
Sacher v. U.S., 343 U.S. 1 (1951) 6
Santosky v. Kramer, 455 U.S. 745 (1982) 6
Steadman v. Sec, 450 U.S. 91, (1981) 7, 8
Vance v. Terrazas, 444 U.S. 252 (1980) 8
Weininger v. Metropolitan Fire Insurance Co., 359 Ill. 584, 195 N.E. 420 (1935) 9
Woodby v. INS, 385 U.S. 276 (1966) 8, 9

RULES OF THE U.S. SUPREME COURT

U.S. Supreme Court Rule 16(b) 10

ALASKA BAR RULES

Alaska Bar Rule 15(b) 6
Alaska Bar Rule 26 12
Alaska Bar Rule 27 13

UNITED STATES STATUTES

8 U.S.C. 1481(c) (1978) 8

No. 83-1611

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PETER WALTON, *Appellant*

v.

ALASKA BAR ASSOCIATION, *Appellee*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

REPLY TO MOTION TO DISMISS OR AFFIRM

APPELLEE'S DESCRIPTION OF THE PROCEEDINGS BELOW DEMONSTRATES THE CONSTITUTIONAL NEED FOR A STANDARD OF CLEAR AND CONVINCING EVIDENCE IN ATTORNEY DISCIPLINE PROCEEDINGS

Appellee argues that the preponderance of the evidence standard is all that is constitutionally required in attorney discipline proceedings as such a standard "promotes public confidence in the high ethical conduct of attorneys" and that this confidence may be eroded if lawyers are allowed to practice law undisciplined when it is "more likely than not" that an unethical act has occurred. (Motion to Dismiss or Affirm at 15-16). Appellee in effect argues that where there is smoke, fire should be presumed, and it is accordingly better that an innocent lawyer be punished for the enhancement of the public image of the profession than to meet a toilsome burden of proof. Appellee amply demonstrates the consequences of this approach in its description of the facts below.

Appellee asserts that the document in question, Exhibit B to the Amended Complaint, was mistakeningly relied upon and exposed only when "no such document could be found in the [Aleut] corporation's files." (Motion to Dismiss or Affirm at 5). This is not a correct statement of the record. A search of the Aleut Corporation's files was conducted at *Walton's* direction after Childs' deposition of April 13, 1978. (Tr. at 174-176). No search was conducted through the corporate files after the Amended Complaint was filed with inference of discovery, contrary to Appellee's suggestion. Appellee further asserts with italicized emphasis that at the second Childs' deposition on April 21, 1978, Walton disclosed the origins of Exhibit B only after the so-called "smoking gun" memorandum was produced, inferring that Walton was cornered into a position of disclosure. (Motion to Dismiss or Affirm at 5-6). In reality *Walton* voluntarily produced the smoking gun memorandum even after opposing counsel indicated he did not want to see it as it was undoubtedly privileged. (Cowden deposition at 20-26). Omitted also from this recitation is the fact that Frank Cowden, to whom the memorandum was addressed, had

personally witnessed Walton's creation of Exhibit B. (Tr. at 158). Regarding this memorandum, Justices Rabinowitz and Matthews said, "It does not constitute evidence of any intent." (Appendix 1, at 17).

Appellee concludes that Walton failed to promptly notify opposing counsel and the Superior Court that the document was a fabrication. (Motion to Dismiss or Affirm at 7). This analysis omits that Walton did in fact promptly notify opposing counsel when any question arose concerning the authenticity of Exhibit B. No such question had been raised or Court appearance made prior to Cowden's deposition where full disclosure was accomplished. These salient, exculpatory facts are glossed over in the haste to find guilt, more probable than not, and manifest the necessity for a heightened standard of proof in attorney discipline proceedings.

Unless heightened care is exercised in examining the facts and circumstances of an attorney's actions, an unjust result can, as here, occur.

There is no question that "lawyers are essential to the primary governmental function of administering justice . . . '[serve] as trusted agents of their clients, and as assistants of the court in search of a just solution to disputes'." *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 460 (1978) (quoting *Cohen v. Hurley*, 366 U.S. 117, 124 (1961)). The importance of the role of attorneys has long been recognized in this country. Indeed, the right to counsel is specifically provided for in the Constitution.[1]

---

[1] Justice Black's dissent in *Cohen v. Hurley*, 366 U.S. 117, 136, 138-139, 145-147 (1961) eloquently describes both the role of attorneys and the relation of the due process of law to the profession:

> For I have always believed that those guarantees, taken together, mean at least as much as Daniel Webster told this Court was meant by due process of law, or the "law of the land," in his famous argument in the *Dartmouth College* case: "By the law of the land is most clearly intended the general law . . . The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society." . . .[12] *Dartmouth College v. Woodward*, 4 Wheat. 518, 581. See also *Vanzant v. Waddel*, 2 Yerger 260, in which Judge

Attorneys function in an adversarial process. Litigation is competitive, heated, argumentative, emotionai, and more often than not, combative. Aggressive advocacy is not only

---

Catron, later Mr. Justice Catron, speaking for the Supreme Court of Tennessee, observed: "The right to life, liberty and property, of every individual, must stand or fall by the same rule or law that governs every other member of the body politic, or 'LAND,' under similar circumstances; and every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void." *Id.*, at 270. The views expressed by Webster and Judge Catron go back at least as far as 1215 and Magna Carta, in which it was provided: "No free man shall be taken or imprisoned, or disseised, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him nor send upon him, but by the lawful judgment of his peers or by the law of the land."

. . . I heartily agree with the view expressed by the majority that lawyers occupy an important position in our society, for I recognize that they have a great deal to do with the administration, the enforcement, the interpretation, and frequently even with the making of the Constitution and the other laws that govern us . . . [t]he important role that lawyers are called upon to play in our society would make it all the more imperative that they not be discriminated against with regard to the basic freedoms that are designed to protect the individual against the tyrannical exertion of governmental power. For, in my judgment, one of the great purposes underlying the grant of those freedoms was to give independence to those who must discharge important public responsibilities. The legal profession, with responsibilities as great as those placed upon any group in our society, must have that independence. If it is denied them, they are likely to become nothing more than parrots of the views of whatever group wields governmental power at the moment. Wherever that has happened in the world, the lawyer, as properly so called and respected, has ceased to perform the highest duty of his calling and has lost the affection and even the respect of the people.

. . . It is beyond dispute that one of the important ends served by the practice of law is that it provides a means of livelihood for the lawyer and those dependent upon him for support. That means of earning a livelihood is not one that has been conferred upon the lawyer as a gift from the State. Quite the contrary, it represents a substantial investment in time, money and energy on the part of the person who prepares himself to go into the legal profession. Moreover, even after a lawyer has been admitted into practice, a

a fact of life, it is a requirement of the Code of Professional Responsibility. Often, parties and, indeed, sometimes their counsel believe that the other side is "unethical", much as this

---

further substantial investment must be made to enable the lawyer to build up the sort of goodwill that lies at the root of any successful practice. Young lawyers must and do take on cases in which their ultimate fee is only a fraction of the real value of the work they put into the case in order to build up this sort of goodwill. The lawyer's abilities, acquired through long and expensive education, and the goodwill attached to his practice, acquired in part through uncompensated services, are capital assets that belong to the lawyer — both as a lawyer and as a man, assuming that such a conceptualistic distinction can be drawn.

These assets should be no more subject to confiscation than his home or any other asset he may have acquired through his industry and initiative. If they are used in violation of an already-existing, clear requirement of the law which pronounces as the penalty for violation confiscation of the assets, and if the violation is established in a proceeding in which all the requirements of the "law of the land" are satisfied, that is one thing. (Footnote omitted). But to confiscate the earning capacity that represents a large part of a lawyer's lifetime achievements on the theory that no such asset exists is quite another. The theory that the practice of law is nothing more than a privilege conferred by the State which it can destroy whenever it can assert a "reasonable" justification for doing so seems to me to permit plain confiscation.

Even apart from the financial impact, the disbarment of a lawyer cannot help but have a tremendous effect upon that lawyer as a man. The dishonor occasioned by an official pronouncement that a man is no longer fit to follow his chosen profession cannot well be ignored. Such dishonor undoubtedly goes far toward destroying the reputation of the man upon whom it is heaped in the community in which he lives. And the suffering that results falls not only upon the disbarred lawyer, but upon his family as well. Government certainly should not be allowed to do this to a man without according him the full benefit of the "law of the land," both constitutional and statutory.

In view of all this, I can see no justification for the notion that membership in the bar is a mere privilege conferred by the State and is therefore subject to withdrawal for the "breach" of whatever vague and indefinite "duties" the courts and other lawyers may see fit to impose on a case-by-case basis. (Footnote omitted). Nearly a century ago, an English judge observed, correctly I think, that "short of those heavy consequences which would attach to the

Court stated in *Addington v. Texas*, 441 U.S. 418, 426-427 (1979), that, "At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is, in fact, within a range of conduct that is generally acceptable." In the course of advocacy, every attorney at one time or another exhibits some behavior which might be perceived by some as symptomatic of unethical conduct, but which is in fact within a range of conduct that is generally acceptable. As in *Addington*, "there is the possible risk that a factfinder might decide to . . . [discipline an attorney], solely on a few isolated instances of unusual conduct . . . [or] idiosyncratic behavior. Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate [discipline] will be ordered." *Id* at 427.[2]

---

greater and more heinous offenses, I own I can conceive of no jurisdiction more serious than that by which a man may be deprived of his degree and status as a barrister, and which, in a such case — perhaps, after he has devoted the best years of his life to this arduous profession, — deprives him of his position as a member of that profession, and throws him back upon the world to commence a new career as best he may, stamped with dishonour and disgrace."

[2] The Court noted in *Polk v. Dodson*, 454 U.S. 312, 318 (1981):

> In our system a defense lawyer characteristically opposes the designated representative of the State. The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.

Chief Justice Burger said in his dissent in *In Re Griffiths*, 413 U.S. 717, 732-733 (1973):

> The very independence of the lawyer from the government on the one hand and client on the other is what makes law a profession, something apart from trades and vocations in which obligations of duty and conscience play a lesser part. It is as crucial to our system of justice as the independence of judges themselves.
>
> The history of the legal profession is filled with accounts of lawyers who risked careers by asserting their independent status in opposition to popular and governmental attitudes, as John Adams did in Boston to defend the soldiers accused in what we know in

Attorneys are disciplined by other attorneys, be they judges or members of the Bar. The politics and personalities of lawyers are inseparable from this process. Such bias is similar to the cultural or class bias noted by this Court in *Santosky*, 455 U.S. 745 (1982). Such factors operate to chill legitimate advocacy if only a more likely than not standard of evidence is utilized. Even though the initial hearing committee under Alaska Bar Rule 15(b) has a lay member, the committee only makes recommendations to the Board of Governors of the Alaska Bar Association which was composed solely of attorneys. They, in turn, make recommendations to the State Supreme Court.[3] The utilization of a clear and convincing standard not only will impress the factfinder with the importance of the decision and reduce the chance of inappropriate

---

our folklore as the "Boston Massacre." To that could be added the lawyers who defended John Peter Zenger and down to lawyers in modern times in cases such as *Johnson v. Zerbst*, 304 U.S. 458 (1938).

In *Sacher v. U.S.*, 343 U.S. 1, 8-9 (1951) the Court observed:

> Our criminal processes are adversary in nature and rely upon the self-interest of the litigants and counsel for full and adequate development of their respective cases. The nature of the proceedings presupposes, or at least stimulates, zeal in the opposing lawyers. But their strife can pervert as well as aid the judicial process unless it is supervised and controlled by a neutral judge representing the overriding social interest in impartial justice and with power to curb both adversaries. The rights and immunities of accused persons would be exposed to serious and obvious abuse if the trial bench did not possess and frequently exert power to curb prejudicial and excessive zeal of prosecutors. The interests of society in the preservation of courtroom control by the judges are no more to be frustrated through unchecked improprieties by defenders.
>
> Of course, it is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts.

[3] The Hearing Committee recommended public censure, not suspension.

findings, but will protect the integrity and independence of advocacy. It is Walton's position that the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States commands no less.

The Supreme Court of Mississippi appropriately said in 1981 in *R. L. Netterville v. Mississippi State Bar*, 397 So. 2d 878, 884 (Miss. 1981) (emphasis added):

> We have concluded that disciplinary proceedings such as those involved here, while said to be neither civil nor criminal, are of sufficient gravity to require a higher standard of evidence than that the complaints committee merely "have cause to believe" from the report that the accused attorney is guilty. A finding by the complaints committee, based upon a report to be made up as outlined above, *that the guilt of the accused attorney has been established to its satisfaction by clear and convincing evidence, is necessary in order to meet the requirements of due process.*

The risk of error should not be balanced equally between the parties as the risk of loss to the attorney is great and to the public interest in independent advocacy, greater yet.

THE PREPONDERANCE OF EVIDENCE STANDARD IN ATTORNEY DISCIPLINE PROCEEDINGS VIOLATES DUE PROCESS

Appellee asserts that the interests at stake in attorney discipline proceedings " . . . are virtually identical to the interests of the disciplined broker in *Steadman v. SEC*, 450 U.S. 91 (1981)." (Footnote omitted). (Motion to Dismiss or Affirm at 19). Attorneys are different than stock brokers. Stock brokers are creatures of, and are regulated by, the Securities and Exchange Commission. Stock brokers are not self-regulated. Stock brokers are not required to be advocates. Stock brokers are not specifically identified in the Constitution. Moreover, *Steadman* is not a Constitutional case, but rather one of statutory interpretation as to Congressional and regulatory intent. Footnote 15 to the Court's Opinion states

clearly: "Petitioner makes no claim that the Federal Constitution requires application of a clear-and-convincing standard. See Tr. of Oral Arg. 10." *Id.* at 97. Here Walton does specifically raise the Federal Constitutional due process issue upon which the Alaska Supreme Court divided three to two.

This Court found in *Steadman* that where Congress has not prescribed the degree of proof which must be adduced by the proponent of a rule or order to carry its burden of persuasion in an administrative proceeding, this Court felt at liberty to prescribe the standard, for "[i]t is the kind of question which has traditionally been left to the judiciary to resolve," *Woodby v. INS*, 385 U.S. 276, 284 (1966). However, where Congress has spoken the court has deferred to, " the traditional powers of Congress to prescribe rules of evidence and standards of proof in federal courts, absent countervailing constitutional constraints." *Steadman* at 95. The discipline of attorneys has been left traditionally and appropriately to the courts and has not been addressed by Congress or even state legislatures.

In *Vance v. Terrazas*, 444 U.S. 252 (1980), this Court recognized that expatriation proceedings were peculiarly within the constitutional authority of Congress, and Congress had indeed spoken on the issue of evidentiary burdens in this field. The Court had earlier ruled in *Nishikawa v. Dulles*, 356 U.S. 129 (1958) that proof of a voluntary expatriating act must be by clear and convincing evidence. Directly thereafter Congress passed 8 U.S.C. ¶1481(c), "its evident aim was to supplant the evidentiary standard prescribed by *Nishikawa*." *Vance*, 444 U.S. at 264. The Court noted that *Nishikawa* was not rooted in the Constitution and that moreover, it was acting in the absence of legislative guidance." *Id.* 265. This Court also concluded, "contrary to the Secretary's position, we have held that expatriation requires the ultimate finding that the citizen has committed the expatriating act with the intent to renounce his citizenship. This in itself is a heavy burden, and we cannot hold that Congress has exceeded its powers by requiring proof of an intentional expatriating act by a preponderance of evidence." *Id.* at 267.[4]

[4] Justice White noted in his concurrence in *In Re Ruffalo*, 390 U.S. 544, 566 (1968):

EQUAL PROTECTION IS INEXTRICABLY INTERTWINED WITH DUE PROCESS IN THE CONTEXT OF THIS CASE AND WAS RAISED BELOW

Appellee concedes that the equal protection issue which complained of differing standards for attorneys and judges was made below. Indeed, Appellee cites that portion of Walton's brief where this issue was raised:

> In *Hanson*, this Court cited the Supreme Court of Texas in the matter of *In Re Laughlin*:
>
> "The serious nature of the proceeding depriving one of a public office . . . ought at the very least to require proof by clear and convincing evidence."
> 265 S.W.2d at 890.
>
> The same argument can be made with regards to attorneys. The same quantum of evidence should apply to judges and lawyers as the same basic issues are involved. To do any less denies attorneys the equal protection of the law.

(Motion to Dismiss of Affirm at 21).

Deleted from this citation is the next sentence in Walton's brief which cites the Fourteenth Amendment case of *Addington v. Texas*, 441 U.S. 418 (1979) and quotes at length therefrom.

> I would hold that a federal court may not deprive an attorney of the opportunity to practice his profession on the basis of a determination after the fact that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct.

Such a test is an articulation of at least a clear and convincing evidentiary standard.

Further, Walton here is charged with fraud, which at common law traditionally had to be proven by clear and convincing evidence. E.g., *Addington v. Texas*, 441. U.S. 418, 424 (1979); *Woodby v. INS*, 385 U.S. 276, 285 n. 18 (1966); *Bank of Pocahontas v. Ferimer*, 161 Va. 37, _____, 170 S.E. 591, 592 (1933); *Weininger v. Metropolitan Fire Insurance Co.*, 359 Ill. 584, 598, 195 N.E. 420, 426 (1935); *Bowe v. Gauge*, 127 Wis. 245, 106 N.W. 1074, 1076 (1906).

Appellee further concedes in note 7:

> Walton had argued *in support of his due process claim* that the individual interests in attorney discipline proceedings were the same as those involved in judicial discipline proceedings. Addressing this argument, the majority opinion noted (emphasis added):
>
> > In light of today's ruling we may be required to reevaluate our holding in *Hanson* if and when we are presented with another case involving disciplinary proceedings against (sic.) a judge.
>
> 676 P.2d at 1085, n. 11.

It is uncontroverted that the Supreme Court of Alaska did specifically rule on the federal due process issue. "Thus, we reject Walton's position that proof by clear and convincing evidence is required as a matter of federal due process." (App. II at 3). A facet of this ruling was to treat Walton's differing standards equal protection argument as a component of the due process claim.

Rule 16(b) states that dismissal will lie when a federal question was not timely or properly raised *and* was not expressly passed on. Here the precise argument that is stated in the second Question Presented in the Jurisdictional Statement was not only argued before the Alaska Supreme Court but was in fact considered and ruled upon. The Alaska Supreme Court recognized that there were indeed differing standards, but nonetheless did not overrule *In Re Hanson*, 532 p.2d 303 (Alaska 1975), where the clear and convincing standard was held appropriate in state judicial disciplinary proceedings. The preponderance standard proscribed by the Alaska Bar Rules in attorney discipline proceedings was in fact adopted by the Alaska Supreme Court as it is that body which promulgates Bar Rules.

In *Braniff Airways v. Nebraska State Board*, 347 U.S. 590 (1954), this Court found that Appellant had raised and preserved an issue notwithstanding wrongful reliance on the Commerce Clause as presenting a Fourteenth Amendment due process question:

> While the question of whether a commodity en route to market is sufficiently settled in a state for purpose of subjection to a property tax has been determined by this Court as a Commerce Clause question, the bare question whether an instrumentality of commerce has tax situs in a state for the purpose of subjection to a property tax is one of due process. However, appellant timely raised and preserved its contention that its property was not taxable because such property had attained no taxable situs in Nebraska. *Though inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented.* See *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67, and cases cited; Robertson and Kirkhan, Jurisdiction of the Supreme Court of the United States (Wolfson and Kurland ed)., 149 *et seq.*(Footnotes omitted)(emphasis added).

Braniff Airways,. at 598-599. Denial of equal protection is an inter-related facet of the federal due process issue upon which the Alaska Supreme Court specifically ruled. E.g., *Ellis v. Dixon*, 349 U.S. 458 (1955). In *Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928), the court said:

> There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefore be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented. *Crowell v. Randell*, 10 Pet. 368, 392, 398; *Neilson v. Lagow*, 12 How. 98, 109-110; *Furman v. Nichol*, 8 Wall. 44, 56; *Green Bay etc., Canal Co. v. Patten Paper Co.*, 172 U.S. 58, 67-68; *St. Louis, Iron Mountain & Southern Ry. Co. v. Starbird*, 243 U.S. 592, 598-599; *Whitney v. California*, 274 U.S. 357, 360.

Judges and lawyers should be disciplined by the same criteria. Both take the same oath and both are officers to each other and the public. Appellee's attempts to distinguish judicial discipline in that "judicial disciplinary proceedings may result in removing a judge from public office" and such will be highly visible whereas attorney discipline "may not become widely known outside of lawyer and judicial circles." (Motion to Dismiss or Affirm at 25). This is a distinction without meaning.[5] Appellee asserts that "the public has a special interest in seeing that its public officials are not lightly removed from office."

(Motion to Dismiss or Affirm at 25-26). The public has an equal interest in seeing that its constitutionally ordained advocates are not disciplined without a just and legal cause.

[5] Alaska Bar Rule 26 requires written notification of suspension to all courts and publication of such in all legal journals and a newspaper of general circulation. See Appendix.

CONCLUSION

Peter Walton is innocent of any intentional wrongdoing. Whether his 24-year unblemished legal career is terminated turns upon the standard of proof applied.[6] The prosecuting attorney conceded at hearing that "The evidence is *not here clear* that there is an intentional deception on the part of Mr. Walton . . . " (Tr. at 223). Due process and the Constitutional status of attorneys require that discipline be supported by clear and convincing evidence.

For the foregoing reason this Court should note probable jurisdiction and set for argument.

Respectfully submitted this 29th day of June, 1984.

ROBERT H. WAGSTAFF
912 W. Sixth Avenue
Anchorage, Alaska 99501
(907) 277-8611
Counsel for Peter Walton

[6] In Alaska suspension is similar to disbarment as reinstatement is not automatic but subject to showing "that the minimal qualifications, competency and learning of law required for admission to practice law in this state and that his resumption of the practice of law . . . will be neither detrimental to the integrity and standing of the bar or the administration of justice and not subversive of the public interest." Alaska Bar Rule 27. The termination of the period of suspension only allows the opportunity to apply for readmission, which may be denied.

APPENDIX

NOTICE TO THE PUBLIC

By order of the Alaska Supreme Court,

PETER T. WALTON

Attorney at Law

is suspended from the practice of law
effective from Frbuary 2, 1984
through August 1, 1985.

Please contact the Alaska Bar Association, P.O. Box 100279, Anchorage, Alaska 99510 Phone (907) 272-7469 for any questions or further information.